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Vol 3165

No. 16270

United States
Court of Appeals
for the Ninth Circuit

See Vol. 3164
Vol. 3165

EDGAR HAROLD TEAGUE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—3-6-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

ROOS, JENNINGS & HAID,
LESLIE L. ROOS,
1100 Mills Tower,
San Francisco 4, Calif.,

Attorneys for Appellant.

ROBERT H. SCHNACKE,
U. S. Attorney, Northern District of California;

BERNARD PETRIE,
Assistant U. S. Attorney,

Attorneys for Appellee.

In the United States District Court for the Northern District of California, Southern Division

Criminal 36232

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGAR HAROLD TEAGUE,

Defendant.

INDICTMENT

(Violation: 18 U.S.C., Section 659—Theft From Foreign Shipment.)

The grand jury charges that Edgar Harold Teague on or about March 6, 1957, at San Francisco, Northern District of California, did wilfully steal from a wharf, with intent to convert to his own use, goods which were a part of a foreign shipment of freight and express, to wit, five coils of used copper wire being shipped from San Francisco to Kobe, Japan, and worth more than $100.

A True Bill.

/s/ STANLEY L. KING,
Foreman.

/s/ LLOYD H. BURKE,
United States Attorney.

Approved as to Form:

/s/ B. P.

Penalty: Imprisonment for not more than 10 years and/or fine of not more than $5,000.

Bail: $1,000.

[Endorsed]: Filed July 31, 1958.

[Title of District Court and Cause.]

PLEA

This case came on regularly this day for entry of plea. Bernard A. Petrie, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Edgar Harold Teague, was present in proper person and with his attorney, Leslie Roos, Esq.

The defendant was called to plead and thereupon entered a plea of "Not Guilty" of the offense charged in the Indictment filed herein against him, which said plea was ordered entered.

After hearing counsel, ordered case continued to September 8, 1958, for trial.

[Title of District Court and Cause.]

MINUTE ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL

This case came on regularly this day for hearing on motion for judgment of acquittal and for judgment.

Bernard A. Petrie, Esq., Assistant United States Attorney, was present on behalf of the United

States. The defendant, Edgar Harold Teague, was present in proper person and with his attorney, Leslie Roos, Esq. William P. Adams, Probation Officer, was present.

Mr. Roos renewed his motion for judgment of acquittal, which motion was Ordered denied.

Ordered case continued to October 15, 1958, at 9:30 a.m. for judgment.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Edgar Harold Teague, the defendant at the bar, Guilty as charged in Indictment.

/s/ JOHN J. ZELASKI,
Foreman.

[Endorsed]: Filed September 22, 1958.

United States District Court for the Northern District of California, Southern Division

No. 36232

UNITED STATES OF AMERICA,

vs.

EDGAR HAROLD TEAGUE.

JUDGMENT AND COMMITMENT

On this 15th day of October, 1958, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a Verdict of Guilty of the offense of Violation 18 U.S.C., Section 659—Theft from a foreign shipment (Defendant Edgar Harold Teague, on or about March 6, 1957, at San Francisco, Northern District of California, did wilfully steal with intent to convert to his own use, goods which were a part of a foreign shipment, to wit, five coils of used copper wire being shipped from San Francisco to Kobe, Japan, and worth more than $100.00)—as charged in Indictment (single count) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year and pay a fine to the United States of America in the sum of One Thousand Dollars ($1,000.00).

It Is Adjudged that Eleven (11) Months of the one-year sentence of imprisonment imposed on defendant be and is hereby Suspended and defendant placed on Probation for a period of Eleven (11) Months, said period of probation to commence and run from and after the expiration of the One (1)

Month term of imprisonment to be served by the defendant. Ordered that defendant report as often and in such manner as directed during the probationary period.

Total term of imprisonment: One (1) Month.
Total amount of fine: $1,000.00.
Total period of probation: Eleven (11) Months.

Ordered that defendant be granted a Five (5) day stay of execution of judgment.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed and entered October 17, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Appellant is Edgar Harold Teague of 6245 Cypress Street, El Cerrito, California;

2. Appellant's attorney is Leslie L. Roos, of the law firm of Roos, Jennings & Haid, 1100 Mills Tower, San Francisco, California;

3. Appellant was convicted by a jury on September 22, 1958, of a violation of 18 U.S.C., Section

659, theft from a foreign shipment, in that on or about March 6, 1957, at San Francisco, Northern District of California, he did wilfully steal from a wharf, with intent to convert to his own use, goods which were part of a foreign shipment of freight in express, to wit, five coils of used copper wire being shipped from San Francisco to Kobe, Japan, and worth more than $100.00;

4. Appellant's motion for a judgment of acquittal, renewed following discharge of the jury pursuant to Rule 29(b) was ordered denied on October 10, 1958;

5. Appellant was adjudged guilty as charged and convicted on October 15, 1958, and sentenced to pay a fee of $1,000 and serve one year in jail of which eleven months was suspended during which defendant was placed on probation.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the aforesaid order denying said motion for a judgment of acquittal and from the above-stated judgment.

Dated this 15th day of October, 1958.

/s/ LESLIE L. ROOS,
Appellant's Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed October 15, 1958.

In the District Court of the United States for the Northern District of California, Southern Division

No. 36232

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGAR HAROLD TEAGUE,

Defendant.

Before: Hon. Albert C. Wollenberg.

MOTION FOR PRODUCTION OF DOCUMENTS AND SUPPRESSION OF EVIDENCE

Friday, August 22, 1958

Appearances:

For the Plaintiff:
ROBERT H. SCHNACKE,
United States Attorney; by
RICHARD H. FOSTER,
Assistant United States Attorney.

For the Defendant:
LESLIE L. ROOS, ESQUIRE.

The Clerk: United States versus Edgar Harold Teague, Motion for Production of Documents and Suppression of Evidence.

Mr. Foster: Ready for the United States.

Mr. Roos: Ready.

The Clerk: Counsel will please state their appearances for the record?

Mr. Roos: Leslie L. Roos for the defendant and moving party, your Honor.

Mr. Foster: Richard H. Foster, Assistant U. S. Attorney, for the Government.

There are really two matters on in connection with this motion. There is also a motion to produce a statement. Now, I told counsel and I also informed Judge Weinfeld at the last calling of this case that there is no statement. The Federal Bureau of Investigation took none and the defendant executed none.

This morning, however, I showed counsel a diagram drawn by an F.B.I. agent in which the defendant placed an X at one portion thereof. I have assured counsel that I will try to Verifax this diagram for him in our office. I also told him I wasn't very confident of the result since the diagram is in pencil and our reproduction equipment is not, I don't think, sensitive enough to form a very good picture of it. [3*]

Mr. Roos: A photostat at our expense would be all right.

The Court: If you can photostat it, I think that's what you should do.

Mr. Roos: That would be fine, your Honor.

Mr. Foster: I don't say by that that we feel that the motion would be good in any case, I don't concede that, but——

The Court: You're apparently willing to give

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

him a copy of this without further discussion of the matter, so it should be a good copy. No use giving him one you don't think is going to turn out. He says he will pay the expense for photostating it.

Mr. Roos: Thank you, your Honor. On the suppression of evidence, your Honor, possibly you might want to pass it for a few moments, because there will be testimony.

The Court: Well, the Clerk informs me that we are at the end of the calendar, and we can hear it now.

Mr. Foster: There is one other matter. The case is presently set for, I believe it is, September 8th. The reason it was set on that date would be because the American President Lines ship on which several of the witnesses are stationed was due to arrive in San Francisco and be in port on that date. It now appears that the ship will not be here on that date and we would request that the matter go over to September 15, that is a week later, because the ship will be in [4] and the witnesses will be available.

It is my understanding that counsel originally, when the matter was originally set, requested a later date than the one that was set, but it was set on the 8th because of the fact that the witnesses would be here on that date.

Mr. Roos: We have no objection.

The Court: All right, we will reset it at this time to the 15th.

Mr. Roos: Mr. Middleton.

ROY SANFORD MIDDLETON

called as a witness by the Defendant, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name to the Court, sir.

The Witness: Roy Sanford Middleton.

Direct Examination

By Mr. Roos:

Q. What is your address, Mr. Middleton?

A. 1837 Burbank Avenue, Richmond.

Q. What is your business or occupation?

A. Retired police officer.

Q. How long have you been retired?

A. A year the first of July.

Q. That would be about July, 1957?

A. '57. [5]

Q. What was your occupation on or about March 7, 1957?

A. I was an active police officer with the City of Richmond, assigned to the Inspector's Bureau handling the Pawnshop and Junk Yard Details.

Q. I see. Did you, on March 7, 1957, have anything to do with five coils of used copper wire that are the subject of the indictment in this case?

A. I did.

Q. What did you do, what was your connection with them?

A. On that morning I happened to be checking the junk yard at No. 8-15th Street, known as the Richmond Iron and Metal. By checking them, I

(Testimony of Roy Sanford Middleton.)

refer to noting purchases they had made on the previous day and on that particular morning.

As I was about to leave the place, I noticed a car parked in the street and the proprietor, Mr. William Press, was standing there discussing a matter with a young fellow which I learned to be the price of a sale of used copper wire. And I observed five coils of wire in this new station wagon that the young man was driving, partially covered with a piece of canvas or painter's drop cloth.

I asked the young fellow, a James Daniels, where he obtained the wire and he said it belonged to his father, or stepfather. I asked him if he had authority to sell the wire and he said he did, authority given to him by his stepfather, and that he had been in Oakland attempting to sell it, but couldn't [6] get the price that his father insisted that he get for the wire. So that's why he appeared there in Richmond.

In looking over the wire through the window of the car, I observed a shipping tag on the wire and being wire that would normally be used by a utility company on power service lines for home or light industry, it appeared to me that he had something in his possession that he didn't have title to to sell.

So I talked to him and asked him if there was anyone at his home, and he said his mother was. I asked him if he would be willing to make a phone call so that we could verify whether or not he had permission to sell the wire.

In response to a phone call, a woman answered

(Testimony of Roy Sanford Middleton.)

and said that she was a Mrs. Teague, the wife of Edgar Teague and that the boy attempting to sell the wire was a son by a former marriage and that his father had asked him to take this wire out and sell it for him and that it had been stored in the garage prior to the time he removed it that morning.

I told the young fellow I wasn't interested in making an arrest in his behalf, but I would want to confiscate the wire and hold it for safe-keeping until we could determine proper ownership, which he agreed to do, and drove his car up to the Hall of Justice and assisted me in unloading it and storing it in the basement in the property vault, for which he has a receipt. [7]

I instructed him to tell his father where the wire was located and have his father come in and talk to me about it.

In the meantime I checked with the various companies, particularly the Pacific Gas & Electric Company. They sent two representatives down there and looked the wire over, stated that it could have been some that was salvaged from their company, or other companies handling similar wire, but apparently it had been disposed of to some metal company which in turn was shipping it to some foreign country, from the tags on it, presumed to be for export.

I then got in contact with the American President Lines after I found that Mr. Teague was employed by them as a painter, and talked to Captain Sledge, gave him a description of the wire and a descrip-

(Testimony of Roy Sanford Middleton.)

tion of the shipping tag attached thereto, and he said he would check further on it.

I heard from Mr. Sledge later, stating——

Mr. Foster: Your Honor, I haven't objected to this narrative form of testimony because I think that the facts of the case are coming out, but I think probably we are getting into an area now that is probably not germane to the motion and has nothing to do with the motion to suppress.

The Court: I guess that is correct. We are going down the block somewhere.

Q. (By Mr. Roos): You had no search warrant at any time to take this wire, did you? [8]

A. No, sir.

Q. You never at any time arrested the young man, Jim Daniels? A. No, sir.

Q. You took the wire out of the automobile yourself, did you not?

A. I removed part of it, yes.

Q. Are you an expert in the various uses of copper wire?

A. I am familiar with some sizes and uses of wire, but I wouldn't consider myself an expert.

Q. I presume that there is nothing entirely unusual about used copper wire being sold to a scrap or junk metal dealer, is there?

A. Unusual if attempted to be sold by individuals, because various companies don't let it get into the hands of individuals, it is usually handled through metal dealers.

Q. That isn't true of all wire, is it?

(Testimony of Roy Sanford Middleton.)

A. All public—all wires and metals used by public utilities.

Q. In your opinion this wire was for the use of a public utility? A. Had been.

Q. Pardon?

A. Apparently had been used by a public utility.

Q. You just determined that since this incident, didn't you? [9] A. I did not.

Q. You didn't know at the time you first saw this wire that it had been used or was the type of wire used by a public utility?

A. Yes, I did, from past experience.

Q. Other than the fact that this was the type of wire that in your opinion was used by a public utility, what else made you feel that you should take some interest in the sale of the wire to the junk dealer?

A. Primarily because the young man, Mr. Daniels, who was attempting to dispose of it through sale to the junk yards, was unable to tell me where he got it, where it come from, who was the rightful owner.

Q. He told you it belonged to his father, didn't he?

A. Yes, but he didn't know himself where it came from or who had it—where he got it originally.

Mr. Roos: I think that's all.

(Testimony of Roy Sanford Middleton.)

Cross-Examination

By Mr. Foster:

Q. How long were you on the Richmond Police Department, I think you called it the Junk Detail?

A. Approximately ten years.

Q. And during that time did you have occasion to cover the cases which had to do with copper wire?

A. That is right. [10]

Q. And on how many occasions would you say during that ten-year period do you think that you came into contact with cases involving utility wire of the kind that is involved here, could you estimate at all?

A. Oh, I'd say it probably would average at least two or three times a month, maybe more.

Q. During that time you became familiar, I take it, with the various kinds of individuals and corporations which disposed of that kind of material?

A. That's right.

Q. Is it unusual for an individual to sell copper utility wire? A. That is right.

Q. What companies are the usual sellers or disposers of that kind of material?

A. Lerner Brothers, in Oakland; the National Iron and Metal, in Oakland; Lakeside Iron and Metal, also in Oakland——

Q. Could you tell us what kind of wire that is; is it utility wire, is that what it is called?

A. This particular wire, as I recall, there was some what they term as a No. 4 semi-hard drawn

(Testimony of Roy Sanford Middleton.)

bare copper wire, which is used normally on about a 220-volt line, or 440-volt. That's light service to various small industries, light industry items, and one thing or another. Some was of a smaller size, some of it was of a little larger size, all of which was bare, [11] majority soft, hard drawn, or semi-hard drawn wire.

Q. Was that the kind of wire that would be used in an individual's home? A. No, sir.

Q. Now, prior to your conversation with Mr. Daniels on the 7th of March, had you had any conversations with or any liaisons with the F. B. I. or any other Federal agency?

A. None whatsoever.

Q. Had they undertaken to conduct—ask you, or had you undertaken any investigation on their behalf? A. None whatsoever.

Q. When was the first time, to your knowledge, this matter was ever brought to the attention of the Federal Bureau of Investigation or any other Federal investigative agency?

A. I believe it was approximately two or three days later from the time that I confiscated the wire that I was informed that such action would be taken by Agent Barthol of the Federal Bureau of Investigation.

Q. You mentioned that you saw a shipping tag on the wire. Was that through the window of the car?

A. Originally, and then later at the Hall of Justice.

(Testimony of Roy Sanford Middleton.)

Q. What was said, as best you can recall on that shipping tag?

A. That was a small tag attached originally to the coil of wire by a small piece of steel wire and on the tag, I have [12] forgotten all the numbers that was on it, but it had the word Kobe and I believe in the right-hand corner it had a light stamp number of 714, to the best of my knowledge.

Q. Was American President Lines on it?

A. There was not, no.

Mr. Foster: No further questions.

Mr. Roos: No further questions.

The Court: All right, sir.

(Witness excused.)

Mr. Roos: Mr. Burroughs.

FRANKLIN S. BURROUGHS

called as a witness by the Defendant, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Franklin S. Burroughs.

Direct Examination

By Mr. Roos:

Q. Mr. Burroughs, you are a special agent of the F.B.I., is that correct? A. Yes.

Q. Were you such on March 7, 1957?

A. Yes.

Q. This copper wire that we have been talking about, did you handle that investigation?

(Testimony of Franklin S. Burroughs.)

A. Yes; I did. [13]

Q. Did you ever obtain a search warrant to obtain this copper wire from the automobile that was described by Mr. Middleton? A. No.

Mr. Roos: That's all.

Cross-Examination

By Mr. Foster:

Q. Mr. Burroughs, when was the first time you knew of the existence of or had anything to do with the copper wire?

A. Approximately March 8 or 9, I am not certain which it is.

Q. That is two days after the 7th?

A. Of 1957, yes.

Q. Did you, to your knowledge or any other Federal investigation agency or agent, request the police officer who has just testified to secure the wire, or conduct any investigation concerning therewith? A. None whatsoever.

Q. Do you have the wire now, Mr. Burroughs?

A. It's in the custody of the U. S. Marshal.

Q. In this building? A. Yes, sir.

Q. Did you obtain or agents of the Federal Bureau of Investigation obtain the wire?

A. Yes; we did. [14]

Q. From whom?

A. From the Richmond Police Department.

Q. You recall about when?

A. It was approximately two weeks ago that we received it from the Richmond Police Department.

(Testimony of Franklin S. Burroughs.)

Q. That is in 1958? A. Yes, sir.

Mr. Foster: No further questions.

Redirect Examination

By Mr. Roos:

Q. In other words, Mr. Burroughs, the Richmond Police Department was acting as your agent in retaining the wire from March 7 until two weeks ago, is that correct?

A. No; the wire was left in the property room, where it was originally placed by the Sergeant.

Q. At your request?

A. They had already placed it there and we left it there until about two weeks ago when we decided to bring it over here to San Francisco.

Q. In other words, they were holding it for you in Richmond, is that correct?

A. It wasn't booked to the United States Marshal, but I guess you could say they were holding it for us at that time after we had gotten into the case.

Q. On or about March 7 or 8? [15]

A. That's correct.

Recross-Examination

By Mr. Foster:

Q. Mr. Burroughs, was it March 7 that you got in the case or was it later than that?

A. No; it was about March 8 or 9, one or two days after this incident.

(Testimony of Franklin S. Burroughs.)

Q. In other words, at the time of this alleged, or the illegal search and seizure, the F.B.I. had nothing to do with the wire, or nothing to do with the investigation? A. That is correct.

Mr. Roos: I have no further questions.

That is all for the defendant, your Honor.

Mr. Foster: Your Honor, please, I think that this motion should be denied for—well, a good number of reasons.

Mr. Burroughs, could you take the stand again? There is one fact that I don't think is plain on the record, and I think it should be included in the record.

FRANKLIN S. BURROUGHS

recalled as a witness, having been previously duly sworn, testified further as follows:

Further Cross-Examination

By Mr. Foster:

Q. What is the name of the defendant in this case? [16] A. Edgar Harold Teague.

Q. Did your investigation determine from whom the wire was taken on March 7?

Mr. Roos: That assumes a fact not in evidence, your Honor, a conclusion that it was taken from anybody.

Q. (By Mr. Foster): Who was the young man that was discussed in evidence here?

A. James Daniels.

Q. That's not the defendant? A. No, sir.

(Testimony of Franklin S. Burroughs.)

Q. Do you know if there is any relationship between them?

A. Yes; James Daniels is the stepson of the defendant.

Mr. Foster: No further questions.

The Court: All right.

Mr. Roos: Your Honor, please, to obviate one objection, I think I neglected, maybe it came out indirectly, to directly establish ownership of the automobile. I think there is no question, you will stipulate the automobile was owned by the defendant.

Mr. Foster: I think if you want that part in the record, you should establish it that way. I don't know.

Mr. Roos: Mr. Middleton. [17]

ROY SANFORD MIDDLETON

recalled as a witness by the defendant, having been previously duly sworn, testified further as follows:

Further Direct Examination

By Mr. Roos:

Q. Mr. Middleton, I assume in your investigation of the automobile and the wire at 8-15th Street in Richmond on March 7, 1957, you determined who the automobile was registered to, did you not?

A. On my question to Mr. Daniels as to the ownership of the automobile, he informed me that it was a car owned by his stepfather, Mr. Teague.

(Testimony of Roy Sanford Middleton.)

Q. I believe it was a new, brand new 1957 Chevrolet station wagon?

A. It was a brand new station wagon, I believe a '57, yes.

Q. Did you check the registration?

A. I did not.

Q. You accepted the boy's statement?

A. I accepted his statement, because I had no intention of impounding the automobile.

Mr. Roos: Thank you.

The Court: All right, that's all.

(Witness excused.)

Mr. Roos: We can establish it if there is any question about it, your Honor, beyond any doubt.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 18 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ P. D. BARTON.

[Endorsed]: Filed October 21, 1958. [18]

The United States District Court, Northern District of California, Southern Division

No. 36,232

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGAR HAROLD TEAGUE,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

TRANSCRIPT ON APPEAL

Appearances:

For the Government:
ROBERT H. SCHNACKE, ESQ.,
United States Attorney, by
BERNARD A. PETRIE, ESQ.,
Assistant U. S. Attorney.

For the Defendant:
LESLIE L. ROOS, ESQ., and
CHARLES M. HAID, JR., ESQ.

Tuesday, September 16, 1958—10:00 o'Clock

(A jury was duly impaneled and sworn to try the cause.)

The Court: Now, Mr. Petrie, do you wish to make an opening statement?

Mr. Petrie: Just a brief one, if I may, your Honor.

Mr. Roos: Your Honor, possibly for the convenience of two witnesses I have subpoenaed here today—they won't be needed today—I wonder if they could deliver their records to the Clerk at this time to be marked for identification and then they could be excused, if your Honor would instruct them to return?

The Court: Is there any objection to that?

Mr. Petrie: No, your Honor.

The Court: You just want to call them up?

Mr. Roos: Mr. Wheeldon.

The Court: What are these records?

Mr. Roos: They are some records of the American President Lines, your Honor, dealing with this matter.

Mr. Petrie: I take it they are just being marked for identification?

Mr. Roos: Marked for identification.

The Court: You are going to have to have the witness come back anyhow. [2*]

Mr. Roos: Yes, I will have him come back, Judge, but I would just like to have the records marked for identification at this time.

The Court: You mean so the witness won't have to wait around?

Mr. Roos: So the witness won't have to wait around.

The Court: All right.

Mr. Roos: Your Honor, there are also some payroll records——

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Petrie: Your Honor, the witness will have to come back to talk about the documents. I don't see what is to be gained by it.

Mr. Roos: I would like the opportunity of examining the documents, to be very frank with you.

Mr. Petrie: I have got no objection to that, your Honor, if Mr. Roos wants to look at the documents.

The Clerk: Defendant's Exhibit A for identification.

(American President Lines documents were marked Defendant's Exhibit A for identification.)

The Court: When do you want the witness to come back?

Mr. Roos: Would it be satisfactory if I call Mr. Teige and let you know? [3]

Mr. Wheeldon: Yes, that will be quite satisfactory.

The Court: We are just doing this, Mr. Witness, so that you don't have to wait around.

Mr. Wheeldon: Thank you very much.

The Court: The documents will be in the custody of the Court and will be returned to you.

Mr. Wheeldon: Thank you very much.

The Court: What else have you got?

Mr. Roos: I think there is Mr. Teige. Are there any other records here?

Mr. Petrie: Your Honor, this is irregular. I have tried to be accommodating. I think the Govern-

ment should now go forward in this case with its witnesses and then Mr. Roos will be able to——

Mr. Roos: Evidently they are right here now. Mr. Teige is attorney for American President Lines. I noticed him in court as a witness. He has been subpoenaed.

The Court: Did you subpoena him?

Mr. Roos: Yes, these are the payroll records?

Mr. Teige: These are the compensation records.

The Court: Have you any objection to leaving them here and then coming back?

Mr. Teige: All right.

The Court: We will mark them in the case and keep them in the custody of the Court so you won't have to [4] wait around.

Mr. Teige: Okay. We will use the latest one Friday.

The Court: I imagine you will be back here this afternoon or tomorrow. Just mark it as an exhibit. Counsel will notify you when to come.

The Clerk: Defendant's Exhibit B marked for identification.

(Compensation records of American President Lines marked Defendant's Exhibit B for identification.)

The Court: There has been no evidence presented before the jury. This is just a procedure to mark some documents that may or may not be used later.

Now, you wish to make your opening statement?

Mr. Petrie: Yes, your Honor.

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

Mr. Petrie: May it please the Court, Mr. Roos, ladies and gentlemen of the jury:

At this stage of a criminal case, Government counsel has an opportunity to make an opening statement to you. The purpose of that is to explain to you the nature of the offense and to give you some preview, as it were, of the evidence to come so that you can follow it more closely, because, of course, you must decide the case on the evidence. After I finish, [5] Mr. Roos will have an opportunity to make an opening statement to you for the defense, or he may reserve his statement until he opens his case after the Government's case.

The charge here is theft from a foreign shipment, a shipment going from the United States to Japan.

I should like to read once again to you the indictment so that you will have the language of it clearly in mind as you listen to the Government's witnesses.

"The Grand Jury charges that Edward Harold Teague, on or about March 6, 1957, at San Francisco, Northern District of California, did wilfully steal from a wharf with intent to convert to his own use goods which were part of a foreign shipment of freight and express, to wit: Five coils of used copper wire, being shipped from San Francisco to Kobe, Japan and worth more than One Hundred Dollars."

That is the indictment. That is the charge before you.

At a later time in the case, after argument, Judge Goodman will instruct you on the law and he will instruct you on the elements of the offense of theft. We needn't anticipate that now.

The witnesses will show that there is a company called the Federated Metals Company in San Francisco. That company, sometime before March 6, 1957, sold 186 coils of used copper wire weighing about 22,000 pounds to a broker in New York. [6] That broker later, or at about the same time, in turn sold the wire to a company in Japan called the Tatsuta Company. The wire was forwarded mechanically by a freight-forwarding agent in San Francisco.

And so there came a time on March 6, 1957, when an employee of Federated Metals Company got the wire ready for shipment. That employee will appear before you—his name is Calkins—and tell you what he did. He will explain that he tagged each coil in that shipment with letters and numbers to designate the shipment and to designate the particular coil in the shipment that was being sent to Japan.

The coils were loaded on a truck of an independent trucker from Thompson Brothers. They were carried to the pier maintained by the American President Lines. At that point a checker, working for American President Lines—he will also appear before you—counted the coils off the truck and found that there were still 186 coils. Those coils were stored at the end of the pier.

The evidence will show you also that this defend-

ant worked in a paint shop quite close to where these coils were stored. You will see that the defendant was a painter working for American President Lines; that he was what is called a leader man. He was the leader of a paint group or gang that worked down there at the piers painting ships and doing other things. [7]

So the coils were unloaded on March 6, 1957. They were checked in, the 186 coils. Then the evidence will show that five of those coils were taken from the shipment. We have the coils here in court. We will bring them before you, first marking them for identification through an agent of the Federal Bureau of Investigation who assumed the custody of them. Then Mr. Calkins will be called to identify them and identify one of the tags that were recovered; and you will see from the evidence that on March 7, 1957, one day after the coils were delivered to the dock and on the same day that the entire shipment went out to Kobe, Japan, the defendant's stepson, a person by the name of Daniels, tried to sell those coils and inquired about the price of those coils with a scrap metal dealer in Richmond. That dealer will be produced. The Government will call Mr. Daniels, also, to describe how he came by the coils.

If we satisfy you that these five coils that we have here are five of the 186 coils, as I think we will, I think the rest of the evidence will satisfy you circumstantially that this defendant, sometime during the evening of March 6, 1957, took five of these

coils with the intent to convert them to his own use, took them away from the dock and gave them to his stepson to dispose of them. If the evidence shows that, as I expect it will, the Government will ask you to return a verdict of guilty. [8]

The Court: Members of the jury, we will take a brief recess now. We try to take a recess in mid-morning and mid-afternoon. The bailiff will show you where the jury room is and that is where you will assemble when you are not in the courtroom.

When you are away from the courtroom, you must not talk about the case among yourselves or let anybody else talk to you about the case, nor should you express or form any opinion until this matter finally reaches your hands for decision. We will take a brief recess now.

(Recess.)

The Court: Proceed.

Mr. Petrie: Your Honor, during the recess I asked the Clerk to mark that map on the blackboard as Government's Exhibit 1 for identification. Mr. Roos, I believe, is agreeable to our using that, your Honor.

Mr. Roos: Yes, I think it appears to be a reasonable facsimile of the area.

Mr. Petrie: So we will call the witness.

The Clerk: Plaintiff's Exhibit 1 for identification.

(The map referred to was marked Plaintiff's Exhibit 1 for identification.)

Mr. Petrie: We will explain the map and develop the map. It is a picture of the pier area and some of the surrounding streets. [9]

Mr. Barthol.

Mr. Roos: May I at this time move that any witnesses other than the witness on the stand be excluded?

The Court: Have you got witnesses here?

Mr. Petrie: Several.

The Court: All right. All the witnesses on both sides of this case who have been subpoenaed here will please remain outside the courtroom—the bailiff will show you where to go—until your names are called, except the witness who has just been called.

Mr. Petrie: Your Honor, I don't think Mr. Burroughs will be a witness. He is an agent of the Federal Bureau of Investigation who sits here on the front row, who is assisting me with the trial. In any event, we ask that he be permitted to stay in the courtroom.

The Court: Very well.

Mr. Petrie: Mr. Barthol.

ROBERT G. BARTHOL

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court and to the jury?

The Witness: My name is Robert G. Barthol. [10]

(Testimony of Robert G. Barthol.)

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Mr. Barthol?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. How long have you held that position?

A. Approximately sixteen and a half years, sir.

Mr. Petrie: I will ask that the five coils of wire be marked Government's Exhibit 2 for identification.

The Clerk: Plaintiff's Exhibit 2 for identification.

(The five coils of wire were marked Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Petrie): Mr. Barthol, will you step down and examine Government's Exhibit 2 for identification and tell us if you can identify it?

A. Yes, sir, I can.

Q. Return to the stand and tell us what that exhibit is and where you first saw it.

A. The exhibit is five coils of copper wire which I first saw in the property room of the Richmond, California, Police Department.

Q. On what date?

A. I first saw it on March 11, 1957.

Q. Did you ever weigh the wire?

A. Yes, sir, I did.

Q. When? [11] A. On April 8, 1957.

Q. Where?

(Testimony of Robert G. Barthol.)

A. At the property room of the Richmond Police Department.

Q. How much did it weigh?

A. 531 pounds.

Q. Did there come a time when you——

Mr. Roos: Just a minute. I understood, Mr. Petrie, that we have a stipulation that at my request and in the presence of Agent Burroughs of the F.B.I., it was weighed by a public weighmaster last Friday and weighed 460 pounds.

Mr. Petrie: That may be evidence, your Honor; there is no stipulation. Mr. Roos is 100% wrong about any stipulation. We did not enter into any stipulation.

Mr. Roos: Didn't you tell me over the phone, Mr. Petrie, that you would stipulate the public weighmaster's weight was correct?

Mr. Petrie: Your Honor, Mr. Roos called me and asked me if he could take the wire out.

Mr. Roos: All right; if that is the way it is, that is all right. I just wanted to know how this trial is going to go, your Honor.

The Court: Well, now, let's not make arguments and engage in discussion among yourselves. If you have anything to say, say it to the Court.

Mr. Roos: Your Honor, there was a stipulation—— [12]

The Court: Go ahead; ask the next question. It is not pertinent to the inquiry here. All that was asked of the witness was, did he weigh it and how

(Testimony of Robert G. Barthol.)

much did it weigh. No occasion for anybody getting excited over that.

Q. (By Mr. Petrie): Did there come a time when you took the wire from the Richmond Police Department, Mr. Barthol?

A. Yes, sir, on August 14th of this year, 1958, I brought the wire from the Richmond Police Department to the United States Marshal's office in this building.

Q. And it was brought from the United States Marshal's office this morning to court; is that true?

A. Yes, sir.

Q. With whom did you have contact in the Richmond Police Department, with what officer?

A. Inspector Roy Middleton.

Mr. Petrie: I have nothing further.

The Court: Any questions?

Mr. Roos: Yes, your Honor.

Cross-Examination

By Mr. Roos:

Q. Mr. Barthol, were you the agent in charge in the investigation of this entire matter?

A. No, sir.

Q. Who was?

A. There was no agent in charge; Mr. Burroughs and myself [13] both investigated the case.

Q. You were both jointly in charge?

A. Yes, sir.

Q. Are you an attorney, Mr. Barthol?

A. No, sir; I am not.

(Testimony of Robert G. Barthol.)

Q. And I presume you have testified for the Bureau in many, many cases, have you?

A. Yes, sir.

Q. And you have investigated many, many cases?

A. Yes, sir.

Q. Now, getting back to this wire, were you present when that wire was weighed, I believe last Friday, by Lyons Van & Storage, Certified Public Weighmasters? A. No, I was not.

Q. Was your colleague, Mr. Burroughs, present at that time? A. I don't know.

Mr. Roos: At this time I have no further questions. I presume that Mr. Barthol will be available if I wish to recall him.

Mr. Petrie: He will be. Thank you, Mr. Barthol.

Mr. Teller.

Your Honor, may I apologize for this oversight? There is one other item I want to introduce through Mr. Barthol. It will only take a moment. May I have him recalled before proceeding? [14]

The Court: You want him before this next witness?

Mr. Petrie: Yes, your Honor.

The Court: Just have the witness remain.

Redirect Examination

By Mr. Petrie:

Q. Mr. Barthol, at the time you secured the wire from the Richmond Police Department, did you secure any other item?

A. No, not at that time, sir.

(Testimony of Robert G. Barthol.)

Q. Some time before the time you took the wire?

A. Yes, sir; I did.

Q. What was that item?

A. A shipping tag that had been on the wire.

Mr. Roos: I will ask that the last part of the answer go out as the opinion and conclusion of the witness.

The Court: It may go out.

Q. (By Mr. Petrie): Do you have the tag that you got from Officer Middleton?

A. Yes, sir (producing document).

Mr. Petrie: May the tag be marked Government's Exhibit 3 for identification, your Honor?

The Clerk: Plaintiff's Exhibit 3 marked for identification.

(The shipping tag referred to was marked Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Petrie): Is the tag that you just handed [15] me that is becoming Government's Exhibit 3 for identification a tag that you took from Officer Middleton?

A. It was from Sgt. Olin of the Richmond Police Department.

Q. When did you take that tag, Mr. Barthol?

A. On October 25, 1957.

Q. Was that the first time that you saw the tag?

A. No; I had seen the tag previously.

W. When did you first see the tag?

A. On March 11 of 1957.

Q. Did Officer Middleton show you the tag on

(Testimony of Robert G. Barthol.)

March 11th? A. Yes, sir, he did.

The Court: Any other questions?

Mr. Petrie: That is all.

The Court: Any questions, Mr. Roos?

Recross-Examination

By Mr. Roos:

Q. Mr. Barthol, there is no question that this wire that is here in court was the same wire that you saw over there in Richmond and brought over to the U. S. Marshal's Office, is there?

A. No, sir.

Q. And the same quantity? A. Yes, sir.

Mr. Roos: No further questions.

(Witness excused.) [16]

WILLIAM I. TELLER

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and jury.

The Witness: William Isadore Teller.

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Mr. Teller?

A. Purchasing Agent.

Q. For what company?

A. Federated Metals Division, American Smelting & Refining Company.

(Testimony of William I. Teller.)

Q. Where are your offices?

A. Well, we are international, but the office here in San Francisco is 1901 Army Street.

Q. And that is where you work, is it not, sir?

A. Right.

Q. What are your duties generally?

A. General duties are buying the non-ferrous materials required for our operations throughout the country.

Q. Did you bring with you this morning certain shipping records pursuant to subpoena?

A. Yes, I did.

Q. May I have those? [17]

A. (The witness handed documents to counsel.)

Mr. Petrie: May these be marked, your Honor, as Government's Exhibit 4 for identification?

The Clerk: Plaintiff's Exhibit 4 marked for identification.

(Records of Federated Metals were marked Plaintiff's Exhibit 4 for identification.)

Q. (By Mr. Petrie): Did there come a time, Mr. Teller, in or before March, 1957, when your company sold a quantity of copper wire—used copper wire? A. Yes, we——

Q. To a broker in New York called Brandeis, Goldschmidt & Co.? A. Correct, sir.

Q. And when was the contract made with the New York broker?

A. If my memory holds me right, January 15, 1957.

(Testimony of William I. Teller.)

Q. Is the contract among the papers that is Government's Exhibit 4 for identification?

A. Right, yes, sir.

Q. When was the material actually shipped by Federated? A. March 6th of '57.

Q. I show you Government's Exhibit 4 for identification. Are those the shipping papers which you have just handed me? A. Yes, sir.

Q. Will you tell us what papers you have there, just [18] briefly, Mr. Teller?

A. The top paper is the contract made by our New York office with Brandeis, Goldschmidt & Co., and that is dated January 15th; and the second is the actual shipping charge sheet that we make at the San Francisco office, showing the amount of material that was shipped and the weight and the price, and then on that goes the rough packing list made downstairs in the plant, the bill of lading moving it from the plant to the dock——

Q. Does that bill of lading show how much wire was sold and sent out by Federated?

A. Yes, in this particular shipment.

Q. How much wire?

A. 186 coils, weighing 22,000 pounds net.

Q. Were the coils weighed by Federated before they were sent out? A. Yes, sir.

Q. What evidence of that do you have among the papers?

A. We have a certification made by our public weighmaster certifying to the number of coils, the

(Testimony of William I. Teller.)

gross and net weight of the materials, the date it was shipped and the boat that it was being moved on.

Q. What boat was it being moved on?

A. SS President Taylor.

Q. Who in your company prepared the material for shipment? [19]

A. Well, it starts off with a bunch of workers down in the plant putting it together, and then Mr. Blackmore and Mr. Calkins, who are two receiving scale men, would actually do the weighing across the scale and seeing to it that the marks were adhered to and so forth.

Q. Can you tell us where your company got the wire?

A. We have many sources of scrap; all I could do was guess as to where I thought this came from.

The Court: I don't think this is material.

Mr. Petrie: We will pass it, then, your Honor, if the witness can't say.

Q. Can you tell us what the sales price was, Mr. Teller, to Brandeis, Goldschmidt?

A. Yes——

Mr. Roos: We object to that as incompetent, irrelevant and immaterial.

Mr. Petrie: It is some evidence of value; the jury has got to find value.

Mr. Roos: What it was sold for in New York doesn't establish its value, or in Japan, or wherever it was sold.

The Court: It might be some evidence of value here. How was it sold, f.o.b.?

(Testimony of William I. Teller.)

The Witness: F.A.S.

The Court: F.A.S.? [20]

The Witness: Delivered to the boat, actually.

Q. (By Mr. Petrie): What do those terms mean, Mr. Teller?

A. Free alongside the ship.

The Court: So you have a price at which the wire was sold, delivered to the boat?

A. That is correct, sir.

Q. (By Mr. Petrie): Did your company then pay freight to the boat?

A. That is correct.

Q. Pay the trucking company? A. Yes.

Q. What was the selling price to Brandeis, Goldschmidt & Co.?

A. $32.75 per hundred pounds.

Q. That is about 32¾ cents per pound?

A. Correct.

Q. What was the material, Mr. Teller? Can you describe it to us?

A. Well, this shipment consisted of coils of bare copper wire, which would be in accordance with the National Waste Material Dealers Association for what we call "berry," which is the code name for No. 1 copper, which is free of all foreign contamination other than copper itself.

Q. It was used wire, was it not?

A. That is correct, sir. [21]

Q. For what purposes might it be used, the used copper?

A. Well, speaking for our own plant, we use it

(Testimony of William I. Teller.)

in blending and also to make—that is blending copper wire with scrap in order to come up with a specific type of ingot for our Tacoma smelter which will make eletrolytic copper wire out of it.

Q. Is used wire in that condition sometimes melted down? A. Yes, sir.

Q. And purified to recover the copper?

A. Yes, sir.

Q. Does your company engage in any such procedure as that, melting down?

A. Well, our Tacoma smelter has an electrolysis process for removing pure copper and putting it back into electrolytic form for use by the wire mills, and of course we in San Francisco use the blending operation actually; we don't refine, actually; we just take the material and mix it together in order to come up with a specification.

Q. How does your company from time to time determine the market value or price of used copper?

A. Generally speaking, it is a supply and demand situation based on electrolytic copper price. Normally, under normal market conditions, No. 1 copper would command a price somewhere between four and five cents under electrolytic copper.

Q. So your starting point is the price of electrolytic copper? [22] A. Yes, sir.

Q. And by electrolytic copper, do you mean the new, unused copper?

A. The wire bar shape, as we call it.

Q. Have you, in response to my request, tried to determine what the market value of used copper wire was on March 6, 1957—used copper wire such

(Testimony of William I. Teller.)

as the wire that you shipped out on the order of Brandeis, Goldschmidt?

A. Well, I tried, but all I was able to come up with was the electrolytic price. We had a falling market from the first part of fifty—last part of '56, if my memory holds me right, through '57 up to date, but we were able to establish the electrolytic price through the period that we made the sale and made the shipment.

Q. What was the electrolytic price during that period? How were you able to establish that?

A. We get a market quotation sheet from our New York office sent in by wire, which tells us what all your prime metals—tin, copper, lead and so forth——

Q. I see you looking at a packet of small sheets. Are those market quotation sheets?

A. Yes, sir.

Mr. Petrie: May these be marked, your Honor, Government's Exhibit 5 for identification?

The Clerk: Plaintiff's Exhibit 5 marked for identification. [23]

(The market quotations referred to were marked Plaintiff's Exhibit 5 for identification.)

The Court: All you are trying to establish here, and it has taken you a long time, is what the market value of this wire was; is that right?

Mr. Petrie: That is right, your Honor.

The Court: Are there any quotes on second-hand

(Testimony of William I. Teller.)

wire—on copper wire of this type, any quotes on scrap?

The Witness: Well, we tried to establish it by the American Metal Market, which usually shows those, but unfortunately, our files do not go back that far; we only keep them three months.

The Court: I see. This is back in the spring of '57.

Mr. Petrie: That's right, your Honor. But the witness has said that the price of this used wire is about 4c, did you say, less than the electrolytic?

A. Yes, sir.

The Court: Is that common——

The Witness: That is common on a pretty static market where the prices aren't fluctuating too much.

The Court: So that you can use the quotes on the electrolytic material and drop down a certain number of cents a pound and you get the scrap price; is that correct?

The Witness: That is correct, your Honor. [24]

The Court: What is it?

Mr. Petrie: That is what I was coming to.

The Witness: Today?

Q. (By Mr. Petrie): No, on March 6, 1957.

The Court: As near as you can say, what was it?

The Witness: I checked those quotation sheets. At the time of the sale, June 15th—I beg your pardon, January 15th, the market quotation was 36c electrolytic.

(Testimony of William I. Teller.)

The Court: And what did that make it in scrap?

Mr. Roos: I think, your Honor, the witness is confused now. I think the date we are maybe concerned with here is March 6, 1957.

Mr. Petrie: Your Honor, the witness started from the date of the contract, which was January 15, 1957.

Mr. Roos: That is irrelevant here.

Mr. Petrie: No, that is his starting point.

The Court: Well, can you shorten it up for us, and tell us on the basis of whatever quotes you have there as to electrolytic material in March of 1957, what it would be for scrap?

Move this along, gentlemen.

Mr. Petrie: I am trying to, your Honor.

The Court: This is a big field in which there can't be any area of dispute. Let's get it finished with quickly. [25]

The Witness: The electrolytic copper price—this would run through March 6th—was 32c a pound, and I would roughly guess at that time the value would be between 27 and 28 cents a pound for scrap.

Q. (By Mr. Petrie): To what point in Japan did the shipment of 186 coils of wire go, Mr. Teller?

A. The shipment was marked for Kobe.

Mr. Petrie: I have nothing further from this witness.

(Testimony of William I. Teller.)

Cross-Examination

By Mr. Roos:

Q. Isn't there a newspaper, the name of which escapes me, published daily which shows dealers' prices for scrap metal, Mr. Teller?

A. Yes, American Metal Market. I was trying to——

Q. Did you look at the American Metal Market for March 6, 1957—or March 7, 1957?

A. No, sir, as I say, we don't have it that far back.

Q. They are available, aren't they?

A. They could be. I wouldn't know where to get one, sir.

Q. Wasn't it about 23 cents or 23½ cents a pound for scrap—isn't that about right for March of 1957?

A. On a falling market, anything is possible. We could have even been out of the market at that time.

A. That newspaper is pretty authoritative, isn't it? [26]

Mr. Petrie: Your Honor, let's see the newspaper.

Mr. Roos: I am asking him.

Mr. Petrie: If Mr. Roos has it, I will stipulate to it.

Mr. Roos: This is a newspaper. I would like to ask the witness some questions about it, Mr. Petrie, if you don't mind. May I, your Honor?

The Court: See if we can just move it along;

(Testimony of William I. Teller.)

that's all. Every defendant is entitled to skilled counsel to ask as many questions as you want, but when you are talking about the market value of some commodity like metal, we can't use up the whole day getting at it. If there is another document that shows the correct market value which is different than what the witness says, let's have it.

Mr. Roos: The newspaper is authoritative, is it not?

A. It usually shows what the dealers are paying for the materials.

Q. It shows it in various cities in the country, does it? A. That is correct.

Q. And for San Francisco, if it said No. 1 heavy copper was 23 or 23½ or 24 cents a pound on that date, you would accept that as market value, would you not?

A. I would accept that as what the dealers were basically paying for scrap, yes, sir. [27]

Q. And that would be a basic indication of market value, right, what the dealers were paying?

A. I am sorry, your Honor; I know what he is leading up to and I have to agree with him, but there is a long "but" that goes along with that, such as the occasion of making sales to mills and export, which usually command a premium, by the way.

Q. I know, but we are talking here about going market value in San Francisco.

A. What I am trying to say is, actually you see these bids by dealers. The price shown in the American Metal Market is usually the price that the deal-

(Testimony of William I. Teller.)

ers are paying for smaller quantities at their door, and in order for a dealer to make a profit, obviously he wouldn't pay them more.

Q. In other words, the price in the newspaper is a higher price than the dealer might pay for a very large quantity; is that correct?

A. The price——

Q. The price that appears in the quotation in this American Metal Market, the newspaper, was the price that a dealer would pay for a small quantity? A. Correct.

Q. If there was a large quantity like 20,000 pounds or something, the dealer would pay less?

A. More.

Q. For a large quantity per pound? [28]

A. He would pay more for a large quantity.

Q. He would pay more for a large quantity per pound?

A. Yes, that is a very peculiar thing.

Q. Where is the dividing line, or is there one?

A. Actually, the dividing line with the dealer is the tonnage that he is handling and whether he has to handle it through jobbers or he can ship it direct.

Q. Well, when we are dealing with fair market value, Mr. Teller, we are just trying to come up with an over-all norm, and for that purpose the quotation in the American Metal Market newspaper is accepted, is it not? A. Yes.

Q. Just like quotations in the Wall Street Journal or the New York stocks on the New York stock exchange; correct? A. Okay, sir.

(Testimony of William I. Teller.)

Mr. Roos: May I, your Honor; I would like to look at these documents for just a moment which the witness produced.

The Court: Are you going to have any magazines with this quotation? If you have it, I will strike the testimony. It is all speculative.

Mr. Roos: I have it, but I don't have it with me, unfortunately. I have it at my office; I didn't know this witness was going to testify today. I will have it. I might add it is the newspapers for March 5th, 6th and 7th. [29]

Q. Let me ask you while you are here, if you will assume and bear with me, that the March 5th newspaper has a San Francisco quotation and the March 7th newspaper has a San Francisco quotation, but the March 6th one does not; that indicates, that there has been no change between March 5th and March 7th, does it not?

A. I would say so, sir.

Mr. Roos: I will produce the newspapers, your Honor. I am sorry I left them in my office.

Q. The wire that we have been talking about that was shipped on this shipment, Mr. Teller, each particular coil did not have a number; is that correct?

A. Each particular coil did have a number, sir.

Q. I mean, each coil had the number "FH3916, Kobe."

A. No. 1 and upward, I think you will see on there. That No. 1 and upward means that they were numbered in numerical order from 1 to 186.

(Testimony of William I. Teller.)

Q. I wonder if you could explain for me on this blue tag here—— A. Yes, sir.

Q. ——the reason for "Quantity shipped, 22,046" being circled, which is a typewritten or printed figure, and then being circled, and then underneath that is written the figure "22,000" in pencil.

A. Yes, sir. The shipment originally was consigned [30] as ten ton metric—ten metric tons, which would have been 22,046 pounds, and the boys couldn't make exact weight, and circling it on our tags mean not to show, and they wrote in the correct weight of our shipment underneath it.

Q. You say all of these coils were numbered, were tagged with a number from 1 to 186, inclusive?

A. I think that is what the paper shows there, sir.

Q. Is that what is meant by "mark FH 3916, Kobe, 1 and up"?

Q. This white document?

A. That is the document going to the dock, sir.

Q. So in the event of any shortage, Mr. Teller, it would be a very simple matter, would it not, to determine whether anything was short?

A. I would assume so.

Mr. Petrie: I will object to that as calling for the conclusion of this witness.

Mr. Roos: He is an expert. I think he is qualified.

Q. Incidentally, did American Metals——

A. American Smelting.

(Testimony of William I. Teller.)

Q. Federated Metals, I am sorry, American Smelting & Refining Company—did your company ever receive any claim—was there any claim ever made to you that the shipment was [31] short when it arrived in Japan?

A. Not to my knowledge, sir.

Q. In other words, Brandeis, Goldschmidt & Co., the immediate purchaser, never made a claim of shortage? A. No, sir.

Q. And as far as you know, the consignee at Kobe never made a claim of shortage?

A. I presume so; I have heard nothing about it other than——

Q. Did you, in the course of this matter, know that the consignee in Japan had counted the matter, or that the material had been counted on the wharf in Japan and there was no shortage? Did you ever learn of that?

Mr. Petrie: I will object to that as calling for hearsay from this witness.

The Court: Yes, sustained.

Q. (By Mr. Roos): If there were a shortage on arrival in Japan, Mr. Teller, in the normal course of the business dealings of Federated Metals, you would expect it to be reported to your company, would you not?

A. Well, it would depend entirely on the type of sale we made, sir. If we had sold it c.i.f., which would have been delivered in Japan, I would say "yes." On a f.a.s. shipment, free alongside, as long

(Testimony of William I. Teller.)

as we have documents showing that the proper tonnage and the proper count got to the dock, I don't believe that we would have received a claim. [32]

Q. But nobody ever asked you to prove that you had made a sufficient delivery to the dock, did they?

A. No, we furnished the papers at the time of shipment, sir.

Q. Your original order was for 200 coils; was that correct?

A. No, sir, I think the original contract called for 60 tons, which would be roughly 120,000 pounds, and there were actually—again I am going by memory at the moment—three shipments made against that particular contract. That would be the first white paper on the front of all that.

Q. Would you look at this telegram here on the front which says, "200 coils, 22,000 pounds," and explain that for us? A. I can't sir.

Q. Pardon me?

A. I don't know what it means. Somebody wrote down 200 coils and put down 22,000 pounds in pencil, which I would guess was an estimation made by someone of the approximate number of coils for the weight.

Q. I will ask you to look at this document entitled "Dock receipt," a yellow paper in the records of the American President Lines which have been marked Defendant's Exhibit A for identification.

Mr. Petrie: Your Honor, I let those be marked because Mr. Roos said he wanted to have a look at

(Testimony of William I. Teller.)

them. I don't think it is proper for him to show these documents to [33] this witness. This witness is not with the American President Lines; he is with the Federated Metals Company.

The Court: I think your objection is good. I don't see any point to any of this examination, either by the Government or by the defense, except to prove that this wire is part of an interstate shipment; that is all.

Mr. Roos: The weight isn't right or anything else, the number of coils.

The Court: In this case, in order to hold the defendant, the Government has to prove that these coils were part of an interstate shipment and that the defendant stole them, and that is all we are concerned with. It doesn't make any difference what shipment they were, how they went. The only reason I allowed any of this testimony is to show that this is part of an interstate shipment.

Mr. Petrie: Foreign shipment, your Honor.

The Court: Foreign shipment, I should say.

Q. (By Mr. Roos): This document labelled "Dock Receipt," would you tell me if you have ever seen that before, Mr. Teller?

The Court: What is he handing him now?

Mr. Petrie: He is handing him a paper that the witness from the American President Lines produced this morning.

The Court: I will sustain the objection. They are not in evidence.

(Testimony of William I. Teller.)

Mr. Roos: The Government's aren't either, your Honor. [34]

The Court: They have not been identified.

Mr. Roos: I am trying to lay a foundation to identify them. Maybe I can do it with this particular document with this witness, your Honor.

The Court: How can this witness identify a document of the American President Lines?

Mr. Roos: I don't know; it is a dock receipt. I am asking him if a copy of that was——

The Court: I will sustain the objection, and you desist from this line of examination. It is immaterial.

Mr. Roos: I don't think it is, your Honor. The reason I questioned him about that document is that it has the same curious material on this document as on this one of the witness' record that he is unable to explain.

The Court: I will sustain the objection on the ground that it is immaterial to this case. Whether it is mysterious or what it is, it is of no importance.

Mr. Roos: The weight, your Honor, and the number of coils in this shipment is extremely vital and important to this case.

The Court: I don't see that, counsel. You may be right. We are only concerned with the material the defendant is charged with stealing. There could have been a million or a dozen coils besides this and it wouldn't make any difference.

Mr. Roos: I will tie it up, your Honor, if I [35]

(Testimony of William I. Teller.)

am given the opportunity, but I can only ask one question at a time of one witness.

Mr. Petrie: Your Honor, the Government's position is that if Mr. Roos wishes to produce this material through some American President Lines witness, he can do it at some later time.

The Court: I will sustain the objection. I don't ordinarily want to limit cross-examination, but this witness was put on only for the purpose of showing that there were 186 coils, or whatever it was, that was shipped at a certain time, delivered to the dock in San Francisco. That is all his testimony is. That is the only materiality.

Mr. Roos: The purpose of my cross-examination, your Honor, if I were allowed to pursue it, would be to show that probably there were 200 coils and not 186.

The Court: I would hold that that is immaterial. What difference does that make? The defendant is not charged with stealing 200 coils; he is charged with stealing these coils that are here in evidence and that is all. The only materiality is, were they down on the dock, were they part of a shipment abroad, and did he take them? That is what the Government has to prove. If they don't prove that, that is the end of the case.

Mr. Roos: The Government hasn't yet proven, your Honor, that any coils were stolen from that particular shipment. [36]

The Court: Of course they haven't. This witness was only put on—I am getting into an unnecessary

(Testimony of William I. Teller.)

discussion—this witness was only put on for the purpose of showing that there was a shipment of so many coils that was sent down to the dock. The Government has to connect up these coils with that shipment. It can't do it all at one time. This witness is only testifying to the character of a whole shipment that was made, 186 coils. That is all he has testified to. I am going to limit cross-examination.

Q. (By Mr. Roos): You did not yourself, Mr. Teller, participate in the weighing of this shipment, did you? A. No, sir.

Q. And anything you know about the weighing is pure hearsay, is it not—in other words, it's what somebody else told you?

A. What is on these documents here.

Q. And you have no personal knowledge of the documents?

A. That is correct; no, sir.

Mr. Ross: I think that is all I have at this time.

Mr. Petrie: The Government offers this Exhibit 4 in evidence, your Honor.

The Court: Do you need it all in evidence—all these documents?

Mr. Petrie: I had thought perhaps we would not, [37] your Honor; but not knowing what Mr. Roos is going to claim, I thought while this witness was here it would be timely for me to offer just Exhibit 4, the shipping documents.

The Court: He has already identified them.

Mr. Petrie: I will not, then, your Honor. If it is necessary to recall this witness——

Mr. Roos: If the whole sheaf of documents is offered, your Honor, I will certainly object to at least a good portion of them as hearsay.

The Court: Anything else of the witness?

Mr. Petrie: No, your Honor.

(Witness excused.)

Mr. Petrie: Mr. Calkins.

CHESTER E. CALKINS

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Chester E. Calkins.

The Clerk: What is your first name?

The Witness: Chester.

The Clerk: Please spell your last name.

The Witness: C-a-l-k-i-n-s. [38]

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Mr. Calkins?

A. Receiving Clerk.

Q. For what company, sir?

A. Federated Metals.

Q. Were you working for that company in March of 1957? A. I was.

Q. Do you recall in that month preparing a shipment of used coils of copper wire for shipment out from Federated?

(Testimony of Chester E. Calkins.)

A. We prepared several shipments that month; I would have to refer to the book.

Q. To the what?

A. I would have to refer to my log book of my shipments.

Q. Did you bring the log book with you, Mr. Calkins? A. Yes.

Q. Can you tell from it if you prepared such a shipment on March 6, 1957? A. I could.

Q. Look at the book and tell us.

A. Yes, there was.

Q. I show you Government's Exhibit 3 for identification, Mr. Calkins, and I ask you if you can identify that tag.

A. It has the same marks as we have in the book.

Q. Well, do you recognize that as a tag that you prepared [39] or not, sir? A. Yes, sir.

Q. And what is the marking on that tag?

A. "FH3916, Kobe, No. 174."

Q. What does the No. 174 refer to, Mr. Calkins?

A. That is the coil number.

Q. You mean that was the 179th coil in the shipment? A. 174th coil in the shipment.

Q. 174th coil in the shipment? A. Yes.

Q. How many coils were there in the shipment?

A. 186.

Mr. Petrie: I have nothing further, your Honor.

(Testimony of Chester E. Calkins.)

Cross-Examination

By Mr. Roos:

Q. I take it, Mr. Calkins, you have no independent recollection of all this except what is referred to in your log book? A. No, I have not.

Q. Where is the reference?

A. This one here (indicating.)

Q. And when were the X's made in the book?

A. That was made after the investigation started and I marked that so that I could find it in the book.

Q. You have talked to somebody about this, have you? [40] A. Yes.

Q. Who was that? A. Mr. Burroughs.

Q. And when did you talk to Mr. Burroughs about it?

A. I couldn't give you the exact date; it was some time last year.

Q. Some time in March of 1957?

A. No, it was later than that.

Q. About April or May? Do you remember approximately?

A. I would say along the middle of the summer.

Q. The summer of '57? A. Yes.

Q. And the information—you didn't count the coils yourself? A. Yes.

Q. You counted them yourself? A. Yes.

Q. And you had 186 coils?

A. Each coil, as it was loaded, there was a tag put on it indicating the coil number.

(Testimony of Chester E. Calkins.)

Q. And how about the weight? Did you weigh them yourself—— A. Yes.

Q. ——or did you get that information from somebody else?

A. I weighed them myself. [41]

Q. And it weighed 22,000 pounds?

A. Uh-huh (affirmative.)

Q. And what scale did you use to weigh them?

A. The truck scales.

Q. Isn't it a little unusual for 186 coils to come out exactly 22,000 pounds right on the nose?

A. Not necessarily. If I remember right, on that particular one we were trying to make 22,000 pounds and we juggled the last few coils to make it come out that weight.

Q. Was there any particular reason you wanted to come out exactly 22,000 pounds?

A. As I understand it, their export license called for not to exceed 22,000 pounds.

Q. Mr. Teller testified from the documents here that the original order was for 10 metric tons, which would have been 22,046 pounds.

A. They they have changed that. I don't know as to what the office—that was the instructions we had, was not to exceed 22,000 pounds.

Q. Weren't you trying to make 22,046 rather than 22,000? A. It might have been 22,046.

Mr. Petrie: What did the witness say, your Honor—"it might have been"?

Mr. Roos: "It might have been."

Q. But it certainly is unusual to get a load of

(Testimony of Chester E. Calkins.)

scrap [42] metal weighing 22,000 pounds, Mr. Calkins, will you concede that?

The Court: Oh, counsel, I don't want to restrict you, but what difference does it make? He has already testified that he loaded that much on.

Mr. Roos: All I can say, your Honor, is that the weight is material; it will appear to your Honor later.

The Witness: You mean exactly a certain even number of pounds? No, I wouldn't say it was unusual because we have received and shipped similar shipments.

Q. Of scrap metal where it is exactly even to the thousandth of a pound? A. Yes.

Q. Thousand pounds? A. Yes.

Q. Just looking through your book, Mr. Calkins, I only seem to find one other where something came out 15,000 pounds and that was Monell Metal, which probably wasn't scrap.

A. It was scrap. That is all we handle there in this book is scrap.

Q. Isn't it a fact that this wasn't weighed accurately at all, Mr. Calkins, when it left Federated Metals, but you merely estimated the weight?

A. No.

Q. Of 22,000 pounds.

A. No, it was weighed accurately. [43]

Mr. Roos: I have no further questions.

(Testimony of Chester E. Calkins.)

Redirect Examination

By Mr. Petrie:

Q. Did you prepare a tag for each of the 186 coils, Mr. Calkins? A. Yes.

Q. Were those tags similar to the tag that is Government's Exhibit 3 for identification?

A. That's right.

Q. The tag numbered 174?

A. That's right.

Q. The letters and numerals and the name Kobe are stamped on the tag, are they not, Mr. Calkins?

A. Yes, they are.

Q. Will you describe what kind of a machine stamps those?

A. It is a hand rubber stamp that you have to put each individual letter in, small holder——

Q. You did that, did you not, when you prepared these tags? A. Yes, I did.

Mr. Petrie: I have nothing further.

Mr. Roos: I have nothing further, your Honor, except to offer Mr. Calkins' log book which he testified from rather than his own recollection. I would like to offer the log book.

Mr. Petrie: The log book refreshed his [44] recollection that he prepared this shipment of 186 coils, your Honor. I will object to it as incompetent and irrelevant.

The Court: Mark it for identification.

Mr. Roos: We will mark it for identification.

(Testimony of Chester E. Calkins.)

Q. While he is here, is this your log book that you keep out there?

A. This is the company book.

Mr. Roos: We will offer it as defendant's next in order.

The Court: I will sustain the objection to it unless you can show the materiality.

Mr. Roos: The witness used it to testify from.

The Court: I know, but you are offering the whole book, counsel, with a great many pages and it has got information and it has got lots of things that have nothing to do with this case. I am not allowing that sort of evidence to go in. Mark it for identification. If it appears at any time that any part of it is important to the defendant's case, it will be here to be admitted.

The Clerk: Defendant's Exhibit C marked for identification.

(Log book of Mr. Calkins was marked Defendant's Exhibit C for identification.)

Mr. Petrie: That is all, Mr. Calkins.

(Witness excused.) [45]

Mr. Petrie: Mr. Peters, please.

DANIEL H. PETERS

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: My name is Daniel H. Peters.

Direct Examination

By Mr. Petrie:

Q. Mr. Peters, what is your occupation?

A. I am employed by the American President Lines in San Francisco. I am Chief Supervisor for the Terminal, Pier 5.

Q. Is your office at the pier? A. Yes, sir.

Q. Have you brought with you this morning a dock receipt? A. Yes, sir.

Q. Or the carbon of a dock receipt, I believe it is. You are handing me two papers; is one a copy of a dock receipt?

A. The green paper here is a duplicate copy of our dock receipt, and the white paper in back of it is a copy from the American Smelting & Refining Company of their bill of lading given to the truck.

Mr. Petrie: May this be marked, your Honor? I didn't want to have the witness testify about it before it is [46] marked. May it be marked Government's Exhibit 6 for identification?

The Clerk: Plaintiff's Exhibit 6 marked for identification.

(Dock receipt referred to was marked Plaintiff's Exhibit 6 for identification.)

(Testimony of Daniel H. Peters.)

Q. (By Mr. Petrie): Where did you get those two papers, Mr. Peters?

A. We had those in our dock file.

Q. You keep a copy of the dock receipt?

A. Yes, sir.

Q. At the pier? A. Yes, sir.

Mr. Petrie: That is all of this witness.

The Court: Are you offering these in evidence?

Mr. Petrie: No, I am just producing them because this witness is the custodian. I am going to produce another witness to talk about them.

Cross-Examination

By Mr. Roos:

Q. Mr. Peters, can you explain for us on this dock receipt which is Plaintiff's Exhibit No. 6, the type—how it happens to bear the typed figures "200 coils" and the typed weight over here "22,046," and then those figures are scratched out and in their stead in pencil is "186 coils, 22,000 pounds, [47] weight not certified"? Can you explain for us, if you know—maybe you don't—how those changes happened to have been made?

A. Well, I can attempt to give you the correct details; there could be one or two variations.

Mr. Petrie: If the witness personally made the changes, your Honor, that is one thing. If he is talking about what he learned from some other source, I am going to object to it.

Mr. Roos: If he knows.

The Court: Did you make those changes?

(Testimony of Daniel H. Peters.)

The Witness: No, sir.

The Court: You are going to recite what somebody told you about that?

The Witness: No, sir.

The Court: If you didn't put the figures down and you are going to explain how they came there, it must be as a result of what somebody else told you.

The Witness: No; what I was going to explain is a possibility of the way they could be changed.

The Court: I think counsel is right in his objection. This is hypothetical.

Q. (By Mr. Roos): Would what you are going to testify on be based on your experience and custom as the superintendent down there at the APL dock?

A. Yes. [48]

The Court: Are you going to have a man who is going to testify about these documents?

Mr. Petrie: Yes, your Honor.

The Court: This would be merely a hypothesis, if he doesn't know. If he knows anything about it——

Mr. Roos: He knows the custom and practice.

The Court: If we have got somebody that knows what was done, we don't need custom and practice. We are wasting a lot of time.

Mr. Roos: Do you have somebody that knows what was done?

The Court: I will sustain the objection.

Mr. Petrie: Yes; if he doesn't know——

Mr. Roos: If the judge wants to speed it up,

I am trying to do that. Mr. Petrie says he doesn't know whether the other man knows about it.

Mr. Petrie: No, I did not. I say I believe the other man is going to be able to testify about these documents. I know he is going to be able to testify about the documents; I don't know whether he will be able to explain that or not.

Mr. Roos: That is all.

Mr. Petrie: All right. Thank you very much, sir.

The Court: We will excuse this witness.

(Witness excused.)

(Recess taken to 2:00 o'clock p.m. this [49] date.)

Tuesday, September 16, 1958—2:00 P.M.

Mr. Petrie: Mr. Delehanty, please.

MARTIN DELEHANTY

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Martin Delehanty.

Direct Examination

By Mr. Petrie:

Q. What is your occupation?

A. Ship's clerk. That is checking freight at the waterfront, freight coming in and going out.

Q. For what company do you work?

(Testimony of Martin Delehanty.)

A. It is the Pacific Maritime Association. That is comprised of all the steamship companies. I work one dock one day and another another day, and so on.

Q. Depending on to which dock you are assigned out by the company?

A. That is right.

Q. Did you from time to time work on the docks of the American President Lines?

A. Yes, sir.

Q. Checking freight into piers there? [50]

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 6 for identification, Mr. Delehanty, and ask you if you recognize that?

A. Yes, that's my handwriting.

Q. What is your handwriting, Mr. Delehanty?

A. The signature here, the number and the date.

Q. When did you put that handwriting on the dock receipt?

A. After the truck was emptied.

Q. You made the check of the truck on that day?

A. As they take them off, I count them one by one.

Q. Did you check off the coils of wire that day?

A. All the coils, yes.

Q. That was March the 6th, 1957?

A. Yes, in the afternoon.

Q. I call your attention to Government's Exhibit 1 on the board, Mr. Delehanty, and I ask you to get yourself oriented on that and show us with

(Testimony of Martin Delehanty.)

the pointer at what place on Pier 50—in the lower left-hand corner that should be.

A. That is where it should be. The trucks come in here, and then they come out here, and that is in between here. And then they come out here to the end. All the stuff like old paint drums and everything, they put out here on this section here.

Q. Do you recall whether it was the end of Shed D? A. Shed D, yes. [51]

Q. Did you from time to time check items off at the end of Shed C?

A. Shed C—it goes A, B, C, D. Sometimes we work over here; we work at all four sheds.

Q. Did you know upon what boat those coils were to be loaded?

A. I don't remember just now.

Q. What makes you recall now that you unloaded the coils near Shed D instead of Shed C?

A. When the trucks came in that had that stuff on, they would put it out on the end of D because they put all the oil drums and big stuff like that here to keep it away from the other cargo.

Q. Did you assist in unloading the coils, Mr. Delehanty, or did you merely check them?

A. Oh, I just simply checked them?

Q. Did you check each individual coil as it came off? Did you make an individual check?

A. Yes.

Q. And then you signed the dock receipt after making the count?

A. I signed the date and the count.

(Testimony of Martin Delehanty.)

Q. How many coils did you check off?

A. 186.

Q. Will you please, Mr. Delehanty, with this white pencil make a large W on that map where the coils were stored after [52] they were unloaded from the truck—just a large W for wire.

A. Right around here (indicating).

Q. Put the pencil down on the table, if you will, please. Now, do you recall if there were any tags on the coils of wire, Mr. Delehanty?

A. Every coil was tagged numerically from 1 to 186 and some of them were kind of imbedded in between—if the rolls were loose, they were kind of imbedded in between. In some cases, if a tag fell off, w would put them back on again. When I counted them, I counted the coils, not the tags.

Q. I show you Government's Exhibit 3; can you tell us if that was the kind of tag that was on the coils of wire?

A. That is about the size and shape of them, and the number, yes, sir.

Mr. Petrie: I have nothing further, your Honor.

Cross-Examination

By Mr. Roos:

Q. Mr. Delehanty, you have checked in and checked out a lot of cargo since March 6, 1957, haven't you? A. Yes, sir.

Q. You don't really have any specific recollection of these particular coils of wire, do you?

A. Yes, I remember them quite well.

(Testimony of Martin Delehanty.)

Q. What did you unload on March 5, 1956?

A. Well, nothing was brought to my attention; there was [53] nothing wrong on March 5th.

Q. This just comes to your attention now because the F.B.I. told you that something was wrong; is that it? A. No, no.

Q. What was wrong on March the 6th?

A. Well, as far as I was concerned, there was nothing wrong, as far as I was concerned; everything okay as far as I was concerned.

Q. You don't remember anything more about March 6th, than you do March 7th or 8th, do you?

A. They came in with the truck and unloaded, and at 3:00 o'clock they went to coffee, and when they finished unloading—they didn't go to coffee right away; they just sat there and smoked about 10 or 15 minutes; then they finished unloading the truck, and I signed the paper and that was all there was to it.

Q. Where did you work on March 7th, 1956?

A. I can't remember that; there was nothing wrong on that date.

Q. Where did you work on March 8th?

A. I don't remember. I think I have a calendar here with the dates and hours I worked at different piers.

Q. Did you refresh your memory from the calendar before you came to court today?

A. No, I didn't, but that is my signature, my handwriting there. [54]

Q. I am not doubting you at all, Mr. Delehanty;

(Testimony of Martin Delehanty.)

all I am saying is you don't remember anything more about this particular coil of wire than you do about any other work you did a year and a half ago, do you?

A. No, I just go from one dock to another, and then he brought up another piece of paper like that the following day that had my handwriting on it, and I——

Q. And this means you counted out 186 coils, does it? A. We circled that.

Q. How about this 186 in blue pencil?

A. No, that would be the one that loaded them on the boat. That shows where it was loaded in Hatch No. 4 between decks. That is put down by the loading clerk that loaded the ship.

Q. And that indication on there, this blue down here, would have been put on by the loading clerk aboard the ship, right? A. Right.

Q. And that indicates, does it not, that 186 coils were loaded aboard the vessel?

Mr. Petrie: I will object to that, your Honor, as calling for the conclusion of this witness. There is no showing that another count was made by the hatch clerk or that this witness knows anything about it.

Mr. Roos: You don't deny that one was made, do you, Mr. Petrie? [55]

The Court: He is not making any contention with regard to that.

Mr. Roos: I would like to know at this time from the United States Attorney as to whether he

(Testimony of Martin Delehanty.)

will produce before this jury the official, whoever he may be, a Mr. Sheehan is the name; I have no idea who he is or where he is—who on the original Plaintiff's No. 6 signed his named under "186 coils"; what do those symbols mean, Mr. Delehanty?

A. No. 4 hatch of the upper 'tween decks.

Mr. Roos: Whether he will produce for this jury the man who made the count aboard the vessel.

Mr. Petrie: Mr. Roos can subpoena any witness that he wants.

Mr. Roos: I don't know where he is or who he is except that on this original his name is Mr. John Sheehan. Are you planning to produce him?

Mr. Petrie: I have never talked to him or I have never heard his name other than your calling it to my attention on the sheet.

Mr. Roos: I think the U. S. Attorney has some duty to get the whole truth before this jury.

The Court: Counsel, I will have to ask the jury to disregard your statement and I will instruct the jury that the United States Attorney hasn't got any duty to do that unless it was necessary for the proof of his case. [56]

Mr. Roos: You mean the U. S. Attorney doesn't have a duty to bring out the truth?

The Court: I am not going to discuss the matter with you. I will simply hold that it is unnecessary for the United States Attorney to prove what wire went into the vessel. It is not part of his job. His duty is to prove, as I said before, that the wire that is here in court went onto this dock and it was

(Testimony of Martin Delehanty.)

stolen by the defendant. If he doesn't prove that, then he doesn't prove his case.

Mr. Roos: If he has evidence that shows 186 cases were delivered by Mr. Delehanty and 186 coils were delivered aboard the vessel and stowed in a hold, he has some duty to reveal it to this Court; otherwise, he is concealing evidence.

The Court: It wouldn't make a bit of difference if he proves by evidence that his particular wire was part of the shipment and was stolen by the defendant. If he doesn't prove that, he doesn't prove his case.

Mr. Roos: If 186 coils were stowed aboard the vessel——

The Court: It just gives you an opportunity to argue some extraneous issue to the jury. All I am saying is that that is immaterial.

Mr. Roos: I submit the guilt or innocence of the defendant is not an extraneous issue, with all due respect [57] to the Court.

The Court: Nor am I saying that. I have put the matter very much more strongly in your favor.

Any other questions?

Mr. Roos: Oh, yes, just one.

Q. Mr. Delehanty, I believe you said that when you unloaded or, rather, when you counted this wire, these coils, some of the tags that were aboard had come loose——

A. As you looked down either way, some tags had come loose and were imbedded in between and in some cases there was maybe three or four of

(Testimony of Martin Delehanty.)

them come off and I just threw them right in with the pile. What I counted was the coils, not the tags.

The Court: That is all of this witness?

Mr. Petrie: No, one more question.

Redirect Examination

By Mr. Petrie:

Q. Mr. Delehanty, some time after you checked this wire at Pier 50, did an F.B.I. agent interview you?

A. Yes, there was two of them there when I was working there some time later.

Q. Do you remember how much after you made the check, how long it was after you made the check?

Mr. Roos: It is incompetent, irrelevant and immaterial. [58]

Mr. Petrie: Your Honor, Mr. Roos has asked the witness what he did on the 7th and what he did on the 8th and so on. I simply want to show that he was interviewed soon thereafter and it became fixed in his mind.

The Court: He has already testified that he was interviewed by an F.B.I. agent.

Q. (By Mr. Petrie): Mr. Delehanty, are the coils of wire before you similar in kind to the ones that you checked off on that day?

A. Very much so; exactly.

Mr. Petrie: I have nothing further.

The Court: That is all?

(Testimony of Martin Delehanty.)

Recross-Examination

By Mr. Roos:

Q. Mr. Delehanty, you can say positively that these are the exact coils that you checked that day?

A. No, it is not a standard size or mark——

Q. It resembles them, but you can't positively say that you counted them.

A. It resembles them very much.

Mr. Roos: Thank you very much.

(Witness excused.)

Mr. Petrie: Mr. Rowland. [59]

HERBERT ROWLAND

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and jury.

The Witness: Herbert Rowland.

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Mr. Rowland?

A. I am with the American President Lines in the freight division. I supervise the outbound section.

Q. Were you working in that position in March of 1957? A. I was.

Q. And did you bring with you certain papers

(Testimony of Herbert Rowland.)

of American President Lines relating to a shipment of copper wire to Japan in the month of March, 1957? A. I did.

Q. What papers did you bring, sir?

A. I brought the company master bill of lading covering the export transactions.

Q. The entire log for a particular ship?

A. The receiving record and the bill of lading master.

Q. Can you locate in that book the bill of lading for this shipment of copper wire to Kobe?

A. Yes, sir, I can. [60]

Q. Do that, will you, sir?

A. I have it right here.

Q. Have you had a photostatic copy of that bill of lading made? A. I have.

Q. May I have the photostatic copy, please?

A. Yes, sir, (handing the document to counsel).

Mr. Petrie: If there is no objection, your Honor, from Mr. Roos, we will use the photostat and you may cross-examine.

Mr. Roos: May we see the original?

Mr. Petrie: It is in that book. Or perhaps we can proceed with the original, your Honor, and I will ask permission to substitute the photostatic copy. There are many other papers in the file.

Q. Do you have also in that book a dock receipt showing the receipt at the pier of those coils of wire?

A. I do. The dock receipt is here.

Q. Is that signed by Mr. Delehanty?

(Testimony of Herbert Rowland.)

A. Yes.

Q. Does it show that 186 coils of copper wire were received at the pier on March 6, 1957?

A. That is right.

Q. What does the bill of lading show, Mr. Rowland?

A. The bill of lading has the usual information: the [61] shipper, the consignee, the destinee, the number of packages and the mark.

Q. Who was the consignee?

A. The consignee was the Tatsuta Industrial Company, Ltd., in Tokyo.

Q. The material was actually directed to Kobe, was it not? A. Yes, sir.

Q. The Tatsuta Company was the consignee to be notified upon the arrival of the material in Japan; is that correct? A. That is correct.

Q. Do you have any paper there that shows or purports to show how many coils of wire were loaded aboard the ship?

A. I do not have the loading record.

Q. Who has that?

A. That is in the Operations—in the pier records.

Q. In the Operations Section? A. Yes.

Q. What person would be in charge of that record? A. I think——

Q. At the present time.

A. Mr. Holgrenson or Mr. Peters. Mr. Holgrenson is the pier superintendent. They would be under his custody.

(Testimony of Herbert Rowland.)

Q. Have you made a photostatic copy also of the dock receipt?

A. Yes, sir, it was with the others. [62]

Q. Was that with the paper that you just handed me? A. It was.

Mr. Petrie: I will ask that the two photostatic copies, your Honor, be marked Government's Exhibit next in order for identification.

The Clerk: As one exhibit, counsel, or two exhibits?

Mr. Petrie: As one exhibit, one with an A.

The Clerk: Plaintiff's Exhibits 7-A and 7-B marked for identification.

(The photostats of bill of lading and dock receipts were marked Plaintiff's Exhibits 7-A and 7-B for identification.)

Q. (By Mr. Petrie): Do you have any personal knowledge of this shipment, Mr. Rowland?

A. No, I do not.

Q. Were you at the pier when it was received from the trucker or when it was loaded onto the ship?

A. No, I was not; my connection is purely documentation.

Q. Can you tell us on what ship the wire was loaded according to the papers?

A. It was the President Taylor, Voyage 1.

Mr. Petrie: I have nothing further, your Honor.

(Testimony of Herbert Rowland.)

Cross-Examination

By Mr. Roos:

Q. Mr. Rowland, could you tell us from your records how much was loaded aboard the President Taylor? [63]

A. I do not have the loading records, but the receiving record is 186, and our bill of lading was issued for 186. As I say, I do not have the loading record; I have the receiving record.

Q. I am not familiar with how these things operate. This tissue document with the number 99537; that is what, sir?

A. That is the original dock receipt.

Q. The original dock receipt, except this is a carbon copy. The original goes—— A. No.

Q. I am sorry to be so ignorant.

A. Our form is a snap-out form. The first five sections are the United States Customs Export Declaration form; then our dock receipts follow on the back of that snap-out form, so while it is a carbon, it is still the original.

Q. What does this evidence, then? Do you give a copy of this with Mr. Delehanty's signature as receiving clerk acknowledging to the shipment that you have received in material, or how does that work?

A. No; when the goods are cleared by the Customs, the dock receipt is sent to the pier. The goods are received against this at the pier.

(Testimony of Herbert Rowland.)

Q. I am sorry to be so stupid, but I don't understand what the purpose of this dock receipt is. It must be signed. Does it acknowledge that American President Lines received [64] the material referred to in it? A. It does.

Q. Is that the purpose?

A. Yes, it does. Against that we issue a bill of lading to the shipper for the number of packages shown on that dock receipt.

Q. And could you explain on the dock receipt the scratch-out of "200 coils" and putting in of "186," and the scratching out of "22,046 pounds," under the weight, and putting in "22,000" in pencil?

A. Well, the 200 was the amount that was originally cleared by the shipper, or in this case the shipper's broker. Then for some reason or other unknown to me, possibly the supplier could not deliver the complete 200 and could only deliver 186. One hundred eighty-six was the number of coils that came into our pier.

Q. You mean, in other words, that these dock receipts are all made up ahead of time before the stuff arrives, because you are expecting it?

A. That is correct. The Customs requires that the goods be cleared before it moves onto the pier.

Q. With regard to the correction of weight, does that "not cert." mean that the weight is not certified? Is that what that means?

A. Yes, sir. [65]

Q. I notice originally it said "200 coils, 22,046

(Testimony of Herbert Rowland.)

pounds," and then it was changed to 186 coils, 22,000 pounds; is that correct?

A. That's correct.

Q. And I take it neither the original weight of 22,046 nor the later weight of 22,000 was certified; is that correct?

A. No, it wasn't certified. It was the weight as represented to us by the shipper and also represented to the Customs.

Q. In other words, American President Lines did not reweigh it itself; is that right?

A. We did not.

Q. How many copies of this dock receipt are issued? I believe you have the original before you and I have a photostat here.

A. I will have to give you an approximation. There is the original which I have here, there is the pier record, there is a copy for the vessel, and then there is one more stowage record.

Q. In practice, then, one copy of this dock receipt goes aboard the vessel; is that correct?

A. Yes, sir.

Q. And what is the procedure after it proceeds from the vessel to the dock? Withdraw that, I am sorry, I have it backwards. [66]

What is the procedure after it arrives on the dock? It is checked out and signed for by the shipping clerk and it is placed on the end of the dock—what happens after that?

A. It is checked again on loading into the vessel.

(Testimony of Herbert Rowland.)

Q. And who checks it and counts it into the vessel?

A. It would be one of the clerks; I suppose you would call him a receiving clerk. I don't really know the title.

Q. Is it a member or one of the officers of the crew? A. No, not of the crew.

Q. Is there some document or other that the captain of the vessel signs after everything has been counted in which he acknowledges receipt of this hold cargo? A. No, sir.

Q. Doesn't the captain sign a manifest sheet or cargo list whereby he acknowledges everything listed on the list has been put aboard the vessel as cargo?

A. Not to my knowledge. The loading records and receiving records are handled by receiving clerks under the direction of the pier personnel.

Q. Government's Exhibit No. 6 is another copy of this dock receipt. Up in the right-hand corner it says "Copy (Dock Record)." Would you take a look at that copy for us? A. Yes, sir.

Q. And could you tell me why that copy does not have the material in heavy blue crayon down in the lower part of it here, [67] "Lot No." and so on, and why that copy has it and your original does not?

A. Yes, sir, my original is signed up, or this original is signed and returned to me—I am up town—and it is my record that the cargo has been received.

(Testimony of Herbert Rowland.)

Q. So all you are concerned with is the receipt on the dock? A. Yes.

Q. And then customarily the lower section is filled out as it is in this case to show the receipt aboard the vessel; is that correct?

A. Yes, sir.

Q. Now, as part of Defendant's Exhibit A for identification—and I might tell you these are American President Lines records produced by Mr. Wheeldon—we have a yellow copy——

Mr. Petrie: Your Honor, I am going to object to it as being out of order. These are documents that Mr. Roos asked to be produced so he could have a look at them this morning, so as not to keep witnesses here. Now he is asking some other witness about it.

The Court: Unless the witness could identify them——

Mr. Roos: This witness works for American President Lines.

Q. This yellow copy says: "Copy for steamer."

The Court: Find out if he can identify them. Did that come before you? [68]

Q. (By Mr. Roos): Would you look at that and tell us if that is not another copy of the dock record, the original of which you have in your possession, Plaintiff's Exhibit 7-A for identification?

A. Yes, sir, it is.

Q. And could you decipher for us the portion below the line on that? Would you read it for us?

Mr. Petrie: I am going to object to the witness

(Testimony of Herbert Rowland.)

reading it. This is some notation that is on the document that this witness didn't——

The Court: Did you make out this document?

The Witness: No, sir, I do not come into the picture on these notes down at the bottom. They are beyond me; they are Operational records.

The Court: The record that the attorney has just handed you is an Operational record?

The Witness: The notation is.

The Court: You have nothing to do with that?

The Witness: No, sir.

The Court: You don't know who put it on or why?

The Witness: No, sir.

Q. (By Mr. Roos): From your experience—how long have you been with A.P.L., sir?

A. Twenty-seven years.

Q. And did you ever have any experience in the dock shipping [69] department, the Operational Department?

A. I have been in the Foreign office mostly.

Q. Isn't it a fact that on those dock receipts the material below the line which does not appear on your original is customarily the place where the ship's count of the material is put in after the material is transferred from the dock to the ship?

Mr. Petrie: Pardon me, your Honor. I am going to object to this. There was a witness here this morning. Apparently that witness can be recalled by the defense and produced at the proper time, who is familiar with this practice as this witness

(Testimony of Herbert Rowland.)

is not. I don't think this is competent for this witness.

The Court: I don't think so, either.

Mr. Roos: Let the witness answer whether he knows——

The Court: It isn't a question of whether he knows, but whether he knows anything about this document.

Do you know anything about this document? Did you have any connection with it?

The Witness: I had nothing to do with those notations. I couldn't say who put those on.

Q. (By Mr. Roos): Could you read the name for us where there is a signature?

A. It appears to be John Sheehan.

Q. Do you know Mr. Sheehan? [70]

A. No.

Q. Never heard of him? A. No, sir.

Q. Who would he be apt to be, do you know?

The Court: What are you trying to do?

Mr. Roos: I am trying to locate the man. I don't know him.

The Court: You can't make this into a discovery proceeding. This witness doesn't know about it. If there is something important there that you want to get in, why, you can subpoena the proper person.

Mr. Roos: I offer to prove by this witness, your Honor, that that notation there indicates that 186 coils of copper wire was put in——

The Court: I know, you said that before, but

(Testimony of Herbert Rowland.)

you can't prove it by this witness because he doesn't know.

Mr. Roos: I think he does now, your Honor, if your Honor will let him answer.

The Court: I will give you any process of the Court if it is necessary and proper for you to prove that fact. You are just taking up time with some witness that doesn't know about it.

Mr. Roos: Well, I think he does from custom and practice. He doesn't know about this particular document.

The Court: I wouldn't allow any evidence in on [71] custom and practice because maybe it wasn't so in this case. When you have got people that are available that can testify to it, you can produce them. I will sustain the last objection. Shortcuts to save time are advisable, but we can't take assumptions in place of proof.

Anything else of the witness?

Mr. Roos: I have no further questions.

The Court: Anything else?

Mr. Petrie: Yes, your Honor.

Redirect Examination

By Mr. Petrie:

Q. Mr. Rowland, do you have any personal knowledge that an independent check was made of these coils of wire as they were loaded aboard the vessel President Taylor? A. No, sir.

Mr. Petrie: The Government offers its Exhibits 7-A and 7-B in evidence, your Honor.

(Testimony of Herbert Rowland.)

The Court: Those are photostats. Do you want to offer the photostats instead of the originals?

Mr. Petrie: Yes, your Honor.

The Court: U. S. Exhibit No. 7——

The Clerk: Plaintiff's Exhibits 7-A and 7-B admitted in evidence.

(Plaintiff's Exhibits 7-A and 7-B for identification were received in evidence.) [72]

Mr. Roos: The defendant will offer the exhibit——

The Court: No, no, one thing at a time. The Government has offered 7. Do you wish to make any objection for the record?

Mr. Roos: No objection, your Honor.

The Court: Admitted.

Now what do you want?

Mr. Roos: I would like to offer with the exhibit as the defendant's next in order the exhibit that has been marked Plaintiff's Exhibit No. 6 for identification.

Mr. Petrie: You offer as part of the exhibit the Government's exhibit which has been marked for identification?

The Court: Do you want that to go into the record, too?

Mr. Petrie: If Mr. Roos wants it in, we will offer it as a Government exhibit.

The Court: U. S. Exhibit 6 is admitted in evidence.

(Plaintiff's Exhibit 6 for identification was received in evidence.)

The Court: That disposes of that.

Is there anything else that you want of the witness?

Mr. Petrie: Nothing, your Honor.

Mr. Roos: That is all, sir.

(Witness excused.)

Mr. Petrie: Mr. White, please. [73]

ROBERT WHITE

called as a witness by the Government being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court and jury?

The Witness: Robert White.

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Mr. White?

A. Teamster.

Q. What company do you work for?

A. Thompson Brothers.

Q. Is that located in San Francisco?

A. That's right.

Q. Were you working there in the spring of 1957? A. I was.

Q. Do you recall in the spring of 1957 picking up a load of coils of copper wire from the Federated Metals Company in San Francisco?

(Testimony of Robert White.)

A. I remember that. I wouldn't exactly know the date or anything like that.

Q. You do recall some time in the spring of last year—— A. That's right.

Q. ——picking up such wire, do you not?

A. Yes. [74]

Q. Where did you take it?

A. I took it down to American President Lines, Pier 50.

Q. I direct your attention to this map on the board, Mr. White. Will you orient yourself and show us with the pointer the route that you followed coming into Pier 50?

A. I come off of Army Street; I went south on Third Street up to Mission Rock Street and Fourth, and then I came down here.

Q. From which direction did you come on Third Street, Mr. White?

A. That would be in a southerly direction.

Q. Well, can you tell us whether you came from the right or you came from the left as you are facing the blackboard?

A. Oh, I came from the right.

Q. Where is the Federated Metals Company located?

A. Let's see; I am kind of confused.

Q. Take your time and get yourself oriented. Pier 50, you will notice, is in the bottom left-hand corner.

A. That's right. Army Street would be over here.

(Testimony of Robert White.)

Q. You are pointing to the left of the map, are you not?

A. Yes; Army Street would be over here. I came down Third Street this way, but according from Federated Metals, it would be south. This is kind of——

Q. It is not oriented so that north is at the top?

A. That's right.

Q. Where did you turn off of Third Street? [75]

A. At Mission Rock and Fourth by the fire house.

Q. Did you make a right turn there?

A. Yes.

Q. And from there you went down Mission Rock to the pier? A. That's right.

Q. To what part of the pier did you go with the truck, can you recall?

A. Yes; I went to the back end of C Shed, and I went straight right in here.

Q. Will you take a white pencil and mark with a large W-1 where the wire was unloaded on the pier to the best of your recollection—a large W and a "1" following it.

A. Right at the back entrance of the pier as you come out here.

Q. Did you count the coils onto your truck at the Federated Metals Company?

A. Yes; I did.

Q. Do you have any recollection now how many coils there were?

A. Oh, approximately——

(Testimony of Robert White.)

Q. If you don't, say so. If you are just guessing, don't say so. A. No; I wouldn't.

Q. All right, we will pass that. After you unloaded the coils at the end of Pier 50, what did you do, Mr. White? [76]

A. I went back to the barn.

Q. What route did you follow going back?

A. I went in between the piers over here and went out to Mission Rock over here and cut across Fourth Street over here and then went back to the barn over in here just before you hit the Fourth Street bridge.

Q. Where is the barn located?

A. On Hubbell and Sixth Street.

Q. Did you at any time on that trip, either going to the pier or leaving the pier, travel on Berry Street? Will you point out Berry Street so we will know what we are talking about?

A. Right in here (indicating).

Q. Did you at any time travel with your truck on Berry Street on that trip in that area?

A. No; I did not.

Mr. Petrie: That is all I have.

While Mr. Roos is conferring, I have just one matter.

Q. Mr. White, were the coils, when you took them down to the pier, secured in any way on your truck? A. Yes; they were.

Q. How?

A. Well, there were stakes all the way around;

(Testimony of Robert White.)

then we put boards on the side so the coils can't slip out.

Q. At the end of the pier after the unloading, did you look at the back of the truck and make sure that all of the coils [77] had been taken off?

A. You wouldn't be able to get out of the gate if there was any, not without a tag.

Q. Did you on that occasion? A. Yes.

Q. And all of the coils had been unloaded?

A. Yes.

Mr. Petrie: That's all.

Cross-Examination

By Mr. Roos:

Q. You are sure they were unloaded, Mr. White, because you couldn't get out of the gate of the A.P.L. dock without a pass, is that right?

A. Well, naturally, you have got to deliver your cargo.

Q. You knew you couldn't get out of the A.P.L. dock without a pass? A. Yes.

The Court: You mean if you had any freight on?

The Witness: Any freight.

Mr. Roos: Thank you, Mr. White.

(Witness excused.)

ROSCOE W. PROUDFOOT

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the [78] Court and to the jury.

The Witness: Roscoe W. Proudfoot.

Direct Examination

By Mr. Petrie:

Q. Mr. Proudfoot, for what company do you work?

A. I am retired, but until August 31st I was dock paymaster for American President Lines.

Q. Until what date, sir?

A. August 31, 1958.

Q. Have you brought with you today certain payroll records of the company showing amounts paid to Edgar Harold Teague on March 6, 1957?

A. I can tell you the number of hours he worked.

Q. Do you have the records with you, sir?

A. Yes.

Q. From which you could make that determination? A. Yes; I have the time cards.

The Court: What name did you say?

Mr. Petrie: Edgar Harold Teague, your Honor.

The Court: You say you have a time card?

The Witness: That's right.

Q. (By Mr. Petrie): That's what you are looking at now? A. Yes, sir.

Q. According to that time card, for how many

(Testimony of Roscoe W. Proudfoot.)

hours of work was Mr. Teague paid on March 6, 1957? [79] A. Fifteen.

Q. How many of those hours were overtime hours? A. Seven.

Q. Are you able to tell from that time card during what hours Mr. Teague worked on the 6th of March? A. No.

Q. What are the regular hours of work?

A. Straight time hours are from 8:00 until 5:00. Overtime is after 5:00, between 5:00 and 8:00—5:00 p.m. and 8:00 a.m.

Q. Does that time card also show the hours Mr. Teague worked or the hours for which he was paid on March the 7th? A. Yes.

Q. How many hours?

A. Eight hours of straight time.

Q. What about March the 8th?

A. Eight hours of straight time.

Q. March the 9th? Well, that's the end of the week? A. That's right.

Q. What about March 5th?

A. Eight hours straight time.

Q. What about March 4th?

A. Eight hours straight time, seven hours overtime.

Mr. Petrie: I have nothing further.

The Court: Any cross?

Mr. Roos: May I see the records that you [80] have here, please, Mr. Petrie?

Mr. Petrie: This is Wednesday, the 6th (showing records).

(Testimony of Roscoe W. Proudfoot.)

The Court: Mr. Roos, is that additional counsel that sits at the table with you?

Mr. Roos: Yes; Mr. Haid, my partner.

The Court: The jury was not queried as to additional counsel in the matter. We have no way of knowing whether or not any members of the jury are acquainted or have any relationship with the other counsel, who was not entered of record in the case.

Mr. Roos: The firm is of record.

The Court: You signed yourself as attorney for the defendant. Has the Government any objection to the appearance of associate counsel at this time?

Mr. Petrie: No, your Honor. I assume that none of the jurors know Mr. Haid.

The Court: What is his full name?

Mr. Roos: Pardon?

The Court: What is the full name of your partner?

Mr. Roos: Charles M. Haid, Jr.

The Court: Are any of the jurors acquainted in any way with Mr. Charles Haid who is associated with the attorney for the defendant, Mr. Roos, in this matter?

(No response.) [81]

The Court: Proceed.

Q. (By Mr. Roos): Are you familiar with the customs and practices of the job of the standby gang of which Mr. Teague was a member?

A. More or less, yes.

(Testimony of Roscoe W. Proudfoot.)

Q. It is customary, I believe—and correct me if I am wrong—that if the men don't take coffee time or meal time, work right through, they are then credited with overtime instead of that time off that they might have taken? What I am driving at is, if there is a ship due to go out the next day and they are working on board that vessel and there is a press of time and they work right through dinner, they get credit for it, don't they?

A. Oh, yes; yes.

Q. Do you know how long Mr. Teague has been a member of the standby gang?

A. I couldn't say offhand.

Q. He is still presently employed in the same job now as he was in the week of March 8th, 1957?

A. That's right.

Mr. Roos: Mark it for identification, please.

The Clerk: Defendant's Exhibit D marked for identification.

(Certain documents were marked Defendant's Exhibit D for identification.) [82]

Q. (By Mr. Roos): Now, possibly while you are here, Mr. Proudfoot—would there be any objection if I established by this man the payroll records that have been subpoenaed that the other man brought out this morning?

Mr. Petrie: It is out of order; it isn't part of the Government's case.

The Court: Better not put it in out of order.

If you have any motions to make, you have a confused record.

Mr. Petrie: Thank you, Mr. Proudfoot.

The Court: That is all.

Mr. Petrie: Captain Johnson, please.

CARL F. A. JOHNSON

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: My name is Carl F. A. Johnson.

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Capt. Johnson?

A. I am a ship master.

Q. What ship are you presently master of?

A. The President Jackson.

Q. Is that in San Francisco now? [83]

A. No; it is in Los Angeles.

Q. When did it arrive in Los Angeles?

A. We arrived in Los Angeles on the—I believe it was the 20th.

Q. The 20th?

A. No, no; that was New York.

Q. Was it some time at the end of last week?

A. Yes; it was Saturday afternoon.

Q. And then you proceeded to San Francisco from Los Angeles, did you? A. Yes.

Q. To appear as a witness in this case?

(Testimony of Carl F. A. Johnson.)

A. Yes.

Q. In the month of March, 1957, what ship were you commanding?

A. The President Taylor.

Q. And did you make a trip in that month from San Francisco to Japan? A. Yes; I did.

Q. When did you leave San Francisco?

A. Well, I had to—I have my log book with me.

Q. You say you have your log book?

A. My log book, yes. We left on March the 9th.

Q. Of 1957? A. Of 1957.

Q. When did you arrive in Japan? [84]

A. We arrived on the 21st of March, 1957.

Q. What port did you first come to in Japan?

A. To Yokohama.

Q. To Yokohama? A. Yes.

Q. What was the date of arrival?

A. March 21st.

Q. Did you make any stops along the way?

A. No, sir.

Q. Does your log book show, Captain, what cargo was loaded aboard the President Taylor at San Francisco? A. No.

Q. It does not? A. No.

Q. After you arrived in Yokohama, did you receive a request to check certain cargo aboard the President Taylor? A. I did.

Q. And as a result of that request, did you make a check of cargo? A. I did.

Q. What cargo did you check?

A. I checked some coils of copper wire.

(Testimony of Carl F. A. Johnson.)

Q. Did you personally count the coils?

A. I did.

Q. On that occasion? [85] A. I did.

Q. Was that on March 21, 1957, the day of your arrival at Yokohama—— A. It was.

Q. Or some later date?

A. No; it was on the 21st.

Q. From what office did you receive the request to check the cargo?

A. I received it through the Yokohama office from San Francisco.

Q. The Yokohama office of American President Lines? A. They relayed it to me.

Q. Was anyone with you when you made the check? A. Yes.

Q. Who? A. The Chief Officer, Mr. Bohle.

Q. How do you spell that name?

A. B-o-h-l-e.

Q. Was anyone else with you when the check was made? A. There was a Japanese checker.

Q. Do you remember his name?

A. No. I may have it here. Yes, Yamaguchi Kazuo.

Q. Where were the coils stored aboard the ship, Captain?

A. In No. 3 upper 'tween deck, starboard side.

Q. Were they stored in some hatch or [86] something?

A. They were stored in No. 3 hatch, in the wing.

Q. Was any other part of the cargo with or near the coils?

(Testimony of Carl F. A. Johnson.)

A. There was some mail stowed on the outboard side, on the outside of it. We had——

Q. Was it necessary to remove the mail before you could count the coils? A. Yes.

Q. Were the coils on top of any other cargo?

A. They were on top of some cases of machinery.

Q. Do you recall what kind of machinery, heavy machinery?

A. Well, some of it was heavy, yes.

Q. Was there any kind of covering above the machinery that served as a floor for the coils?

A. Yes.

Q. What? A. Wooden dunnage.

Q. Wooden dunnage? A. Yes.

Q. Pallets or something else?

A. No; it was wooden—regular dunnage boards.

Q. You say you personally counted the coils on that occasion? A. I did.

Q. Did you make a note in your log——

A. I did. [87]

Q. ——about the number of coils that you found? A. I did.

Q. How many coils did you find?

A. 181.

Mr. Roos: Your Honor, I am going to object on the ground that it is incompetent, irrelevant and immaterial; no proper foundation is laid in that Mr. Petrie hasn't yet proven how many coils went aboard the vessel.

The Court: I will overrule the objection.

Q. (By Mr. Petrie): How many coils did you

(Testimony of Carl F. A. Johnson.)

find, Captain? A. 181.

Q. Did the chief mate make a separate count of the coils? A. Yes, sir.

Q. Did his figure correspond to yours?

A. It did.

Q. Did the Japanese checker make a count?

A. Yes.

Q. Did his figures correspond to yours?

A. His figures corresponded.

Q. What effort did you make to make sure that you had found all the coils?

A. Well, we searched the wing afterwards, after we got all the coils out of there and found nothing; no more coils in there.

Q. Did you personally look through the [88] machinery? A. Yes; I did.

Q. When did the boat leave Yokohama?

A. We left Yokohama on the 23rd of March, 1957.

Q. During the time that the boat was in Yokohama, was the hatch in which the coils were stored opened? A. Yes, sir.

Q. Was it accessible to members of the crew?

A. Yes, sir. They were working continuously.

Q. Were the coils of the same size or different sizes, Captain? A. They were various sizes.

Q. Irregular sizes? A. Irregular sizes.

Q. Where did the boat go after it left Yokohama? A. To Kobe, Japan.

Q. Do you know where the coils were unloaded of your personal knowledge?

(Testimony of Carl F. A. Johnson.)

A. Well, I didn't see them being unloaded, but they were unloaded in Kobe.

Q. You weren't present when they were unloaded? A. No, sir.

Mr. Petrie: I have nothing further.

Cross-Examination

By Mr. Roos:

Q. Captain, is the steamer's copy of the dock receipt a [89] part of records kept aboard the vessel? A. May I hear that again?

Q. Is the steamer's copy of the dock receipt part of the records kept aboard the vessel?

A. I believe they are. Sometimes we don't get them in time and they are mailed.

Q. Let me show you what purports to be a steamer's copy of the dock receipt covering these 186 coils of wire and ask you if you remember having that aboard ship?

A. Well, I haven't—I didn't see it personally. The chief officer keeps that.

Q. That would be kept by the chief officer?

A. Chief officer.

Q. And it would be kept as one of the official records of the ship? A. Yes.

Q. In the usual course of business of operating the ship? A. Correct.

Q. When cargo is checked from the dock to the ship, is it counted? A. No; not by us.

Q. By——

(Testimony of Carl F. A. Johnson.)

A. Not by the ship's crew personnel.

Q. Who does count it?

A. A dock checker. [90]

Q. And that count of the dock checker is then endorsed on the ship's copy of the dock receipt and signed; is that correct?

A. I believe it is.

Q. And would you look at the document in front of you and would you tell us what those figures and letters mean down at the bottom?

A. L—I don't know if this is a "U" or "T."

Mr. Petrie: Is that, your Honor, a paper with which this witness is familiar?

The Court: I don't know whether we should let go to the jury what something means to the witness.

Mr. Roos: They are well-known abbreviations, your Honor, for various terms——

The Court: You are still trying to get into evidence indirectly something that is capable of direct proof.

Mr. Roos: I am proving it directly, your Honor, by the captain of the ship. It was one of the business records of the ship and in the custody of the ship.

The Court: He hasn't testified that this document was on the ship. I will sustain the objection.

Mr. Roos: He testified, your Honor, it was on the ship in the custody of the chief officer.

The Court: He didn't so testify. You asked him if that would be the manner in which it would be

(Testimony of Carl F. A. Johnson.)

done. He [91] didn't testify that this document was on the ship.

Q. (By Mr. Roos): Do you know whether this document was on the ship or not?

A. I do not know.

Q. Do you know who a John Sheehan is?

A. No, sir.

Q. How would you know what cargo you had on board ship if you didn't have a dock receipt?

A. Well, we have a manifest.

Q. Do you have the manifest with you?

A. The manifest is made up aboard the ship.

Q. Do you have the manifest?

A. I do not have the manifest.

Q. Where is the manifest?

A. The manifest is—the manifest is made up by the purser.

Q. Who was the purser?

The Court: Well, this is taking too long, counsel.

Mr. Roos: Well, I am sorry, your Honor——

The Court: I am not going to permit this examination——

Mr. Roos: It is of some importance to the defendant.

The Court: It is not competent testimony in this case, how a person makes up a manifest. We are concerned only with the charge contained in this indictment, and I shall confine [92] the case to this indictment. I shall repeat to you again that it is the burden of the United States to prove that the wire that is here in the courtroom was stolen by the de-

(Testimony of Carl F. A. Johnson.)

fendant. If they don't prove it, it doesn't make any difference how many manifests were made out by what people.

Mr. Roos: It is of some importance to the defendant, your Honor. If 186 coils of wire were counted aboard this vessel which would make it impossible for five coils to have been stolen from the wharf, your Honor——

The Court: It wouldn't make it impossible at all. If there was direct testimony of the witness who saw the defendant take this wire, it wouldn't make any difference what anybody put on a piece of paper. That evidence would be sufficient if it were produced. I am merely pointing out to you that this particular testimony of this witness is not competent. I so hold. That's the end of that.

Now you may proceed to some other examination.

Q. (By Mr. Roos): Was the wire counted more than once aboard the vessel, Captain?

A. We counted——

Mr. Petrie: If this witness has personal knowledge.

Q. (By Mr. Roos): Was the wire counted more than once aboard the vessel?

A. I counted it once.

Q. Was it counted more than once? [93]

A. Not to my knowledge.

Q. All right, Captain, I will show you a letter and ask you if this letter is in your handwriting?

(Testimony of Carl F. A. Johnson.)

It is also a part of Defendant's Exhibit A for identification. (Showing to counsel.)

Mr. Petrie: All right.

Q. (By Mr. Roos): On the stationery of American President Lines, dated March 27, 1957, aboard the President Taylor and signed "Carl." Was that letter written by you? A. Yes; it is.

Q. Does that letter refresh your recollection that you now recall there was more than one count of that wire, Captain? A. Well——

Q. Just answer my question.

Mr. Petrie: That is not a fair question, your Honor. The witness said he only made one count.

The Witness: May I——

Mr. Roos: I think the record speaks for itself.

The Court: You took the paper away from him. You asked him if the letter refreshed his recollection. Now you don't give him a chance to answer it.

Mr. Roos: Well, Mr. Petrie is doing the objecting. I will let him answer.

Q. Does that refresh your recollection?

The Court: Have you had a chance to look at the letter? [94]

The Witness: Yes; I wrote it. I was told it was counted.

Q. (By Mr. Roos): Would you read that letter out loud for us, Captain?

Mr. Petrie: Your Honor, I don't think it is competent. If Mr. Roos wants to make some point, there's a proper way of doing it. It is a report of what somebody told the captain.

(Testimony of Carl F. A. Johnson.)

The Court: I will not permit the question by which the attorney directs the witness to read the letter out loud, but the last question was whether or not the letter, if you have read it, whether it refreshes your recollection on the subject of how many counts there were made of the merchandise. Does it or doesn't it?

The Witness: It does.

The Court: All right; ask your next question.

Q. (By Mr. Roos): There were two counts made, weren't there, one made in Yokohama?

A. One made in Yokohama——

Q. And a second one made in Kobe.

A. Yes; but it was not made by me.

Q. I didn't ask you who made it, Captain. It was made, was it not?

A. I was told it was made.

Q. You were told it was made; it came to your knowledge [95] and it was reported to you by—as a matter of fact, the count was made under your direction, was it not?

A. I don't recall that.

Q. Let me refresh your recollection again by this letter:

"Dear Dunc:

"Please refer to my letter from Yokohama"——

Mr. Petrie: I will object to Mr. Roos reading the letter.

The Court: Let the witness see the letter.

Mr. Roos: I want to read the part of it to

(Testimony of Carl F. A. Johnson.)

specifically refresh his recollection that the witness ordered the count made. The letter reads:

"I had Toller, the third mate"——

The Court: He hasn't said he didn't order the count made. You take the letter away from him; let him read the letter. Give him a chance to see what he said in the letter and then he can answer your question.

Mr. Roos: He has read it three times.

The Court: Now ask your question.

Q. (By Mr. Roos): You have read the letter, Captain? A. Yes; I have; yes.

Q. You are thoroughly familiar with it?

A. Yes.

Q. Does the letter refresh your recollection that you directed the third mate, Toller, to make another count of the [96] coils in Kobe?

A. Actually, it was the chief officer that directed him to do it.

Q. You wrote to Mr. Duncan Ward, did you not?

A. Yes.

Q. And you said, "I had Toller, the third mate, check the coils," did you not?

A. I have said in there I had. The chief mate acted for me.

Q. And what did the chief mate then report to you? A. He reported——

Mr. Petrie: I will object to this as hearsay, your Honor.

The Court: Is this offered——

(Testimony of Carl F. A. Johnson.)

Mr. Roos: I would like your Honor to read the letter. It might make——

The Court: I will allow the question.

Mr. Roos: Thank you.

Q. What did the chief mate report to you as to the result of that count?

A. He reported that Toller had found 186 coils.

Q. And he also reported that Toller had found five extra coils behind the machinery for Singapore?

A. That's what Toller reported to him.

Q. And you checked this out yourself, didn't you? [97]

A. I checked it—not in Kobe; I checked the coils in Yokohama.

Q. And after receiving a different report in Kobe, you mean you never checked them yourself to see whether Toller was wrong or the chief mate was wrong or whether you were wrong?

A. Because I didn't get the report until the wire was already off the ship.

Q. When did the wire go off the ship?

A. I am not—I don't recall just what day it was.

Q. Would the ship's log show us that, Captain?

A. It does not show the time. It only shows the time the hatches are working.

The Court: Well, the upshot of all this is that you say you counted them and there were 181; that the mate and somebody else counted them later and they reported to you that they found another five and there were 186; is that the upshot of it?

(Testimony of Carl F. A. Johnson.)

The Witness: That's right.

The Court: Do we have to labor it any further?

Q. (By Mr. Roos): And also, Captain, the Japanese checkers in Japan counted those coils off the ship just like the American checkers counted them on board in San Francisco, isn't that correct?

A. That is correct.

Mr. Petrie: Your Honor, I am going to object to [98] that as calling for hearsay from this witness.

The Court: Yes; sustained.

Q. (By Mr. Roos): Weren't you there when the Japanese checkers counted the cargo off?

A. In Kobe?

Q. Yes.

A. I was not present when they counted it, no.

Q. Well, they checked it off just like it was checked off here?

The Court: He can't answer that. I will sustain the objection to that.

Mr. Roos: Did you, Captain, receive a report from the Japanese checkers that there was 186 coils of wire aboard?

Mr. Petrie: I will object to that, your Honor, as calling for hearsay.

Mr. Roos: I have the report here from the A.P.L. records.

Mr. Petrie: I thought perhaps you did, Mr. Roos, but at the same time, your Honor, the Government is prepared to stipulate that 186 coils were unloaded at Kobe, if Mr. Roos will stipulate to the

(Testimony of Carl F. A. Johnson.)

weight certificate of the Japanese weighers that I have here, that he has, also, perhaps. I am not trying to hide anything. I am going to object, your Honor, to the question directed to the hearsay of this witness.

The Court: I will sustain the objection. [99] Can't you agree on these documents?

Mr. Petrie: We haven't been able to.

Mr. Roos: The first time I knew they existed was at 10:00 o'clock this morning when Mr. Wheeldon delivered them into court.

The Court: Anything else of the witness?

Mr. Roos: Yes, your Honor.

Q. What is a cargo boat note, Captain?

A. A boat note?

Q. Yes.

A. That is a checker's report of the cargo delivered aboard.

Q. Or taken off? A. Or taken off, yes.

Q. Is that an official ship's record?

A. Yes.

Q. I will show you this cargo boat note and ask you if that is one of the official ship's records of the president Taylor? Was it? A. Yes.

Mr. Roos: We will offer that in evidence, your Honor, as defendant's next in order.

Mr. Petrie: I haven't seen it.

Mr. Roos: I am sure that Mr. Petrie has copies of all of these. [100]

Mr. Petrie: I haven't seen this record.

(Testimony of Carl F. A. Johnson.)

Mr. Roos: Showing the receipt by Senko Checkers Company, Ltd., of 186 coils of copper scrap.

Mr. Petrie: If Mr. Roos is going to read from a document, he hardly needs it in evidence. I don't think there has been an adequate explanation of what it is yet, your Honor, how it is made up, when it is made up, and therefore I am going to object to its admission into evidence at this time.

The Court: How did you get this document?

The Witness: The check—the company that does the checking, I believe in Kobe it is the contractor, and, as they unload the cargo to the dock, they count it and——

The Court: They give the ship a report of their count?

The Witness: A report of the count.

The Court: And what you speak of as the boat note, that is the document that you get from the Japanese checkers as to the quantity unloaded and you take that document and you put it in the records of the ship?

The Witness: That's right.

Mr. Roos: May it be admitted, your Honor?

The Court: Is there any objection to it being admitted? I think you said that you would be willing to stipulate——

Mr. Petrie: I would be willing to stipulate [101] that 186 coils were unloaded at——

The Court: All right, it may be admitted.

Mr. Petrie: ——Kobe, your Honor, not Yokohama.

(Testimony of Carl F. A. Johnson.)

The Court: At Kobe, yes.

The Clerk: You want that as part of Exhibit A?

Mr. Roos: No; I think we will have to separate Exhibit A——

The Court: Can't you cover it by the stipulation that this document of the checkers at Kobe show that 186 coils were checked out of the boat by the Japanese checking concern, and that document was included in the ship's records?

Mr. Roos: That is agreeable if that is stipulated to.

Mr. Petrie: That is agreeable.

The Court: Then you don't need to fill up the record with a lot of documents.

Mr. Roos: Also, while this witness is here, I would like to offer in evidence this letter of March 27, 1957, the letter beginning "Dear Dunc" and signed "Carl."

Mr. Petrie: It is incompetent, your Honor.

The Court: Well, I think the facts have already been testified to. Mark it for identification for what it is worth.

The Clerk: Defendant's Exhibit E marked for identification.

(Letter dated 3/27/57, "Carl" to "Dear Dunc," was marked Defendant's Exhibit E for identification.) [102]

Mr. Roos: What is the ruling on the cargo boat note, your Honor? I would like to have it in, despite the stipulation.

(Testimony of Carl F. A. Johnson.)

Mr. Petrie: There is no objection to the admission.

The Court: All right, put it in.

The Clerk: Defendant's Exhibit F marked for identification.

(Cargo boat note referred to was marked Defendant's Exhibit F.)

The Court: Anything further of this witness now?

Mr. Roos: No, your Honor, I think that is all. Thank you, Captain.

Mr. Petrie: I have some more questions, Mr. Roos. May I have your exhibit, please?

Redirect Examination

By Mr. Petrie:

Q. I notice among the papers that are Defendant's Exhibit A for identification a copy of a certificate of measurement and/or weight. Can you identify that document for us?

Mr. Roos: We object to it, your Honor, as incompetent, irrelevant and immaterial, and hearsay. Mr. Petrie knows better than to offer such a document.

Mr. Petrie: I do not, your Honor. This is a business record just as the boat note or anything else.

The Court: What group of documents are [103] you——

Mr. Petrie: The papers produced by American

(Testimony of Carl F. A. Johnson.)

President Lines through Mr. Wheeldon this morning when counsel for the defense subpoenaed him.

Mr. Roos: To take a word from Mr. Petrie's book, your Honor, this witness is not the proper man to talk about those documents. Those are in Mr. Wheeldon's records, not the ship's records.

Mr. Petrie: Your Honor, if he can talk about the boat note——

Mr. Roos: This is a ship's record, counsel; this is not. This witness isn't familiar with it.

The Court: This is the same certificate that you are referring to, isn't it?

Mr. Roos: No, your Honor.

Mr. Petrie: I think Mr. Roos did not refer to that, your Honor.

The Court: Well, I have got a note here that you had a boat note. Where is that? You offered it in evidence yourself.

Mr. Roos: That is the boat note (handing paper to the Court). That is a ship's record; the other is not.

Mr. Petrie: This is the certificate of the Japanese weigher at Kobe, your Honor, which confirms that 186 coils were unloaded.

Mr. Roos: Just a minute. [104]

Mr. Petrie: Well, we have stipulated that 186 coils were unloaded.

The Court: This is also a part of the——

Mr. Petrie: Company's records.

The Court: ——company's records. I have ad-

(Testimony of Carl F. A. Johnson.)

mitted, at your request, the cargo boat note by the checkers. I will admit the——

Mr. Roos: The cargo boat note, if your Honor please, was a ship's record.

The Court: No, it wasn't. I didn't admit it as a ship's record; I admitted it as a record of the Japanese checkers who furnished it to the boat. This is another one that they furnished to the boat.

Mr. Roos: That is not furnished to the boat, your Honor. It was not furnished until this investigation commenced.

Mr. Petrie: That is not true.

Mr. Roos: It is true.

Mr. Petrie: That statement is without foundation.

Mr. Roos: And I will prove it by Mr. Wheeldon who is the only one in the company who knows it. The captain never saw that weight certificate.

The Court: If the Japanese records are good enough for the number of coils, they are good enough for the weight. [105]

Mr. Roos: I will object to it, your Honor——

The Court: We are talking in terms of justice, so I will admit the other record, too.

Mr. Roos: I object to it as hearsay of the rankest kind.

Mr. Petrie: The Government offers the certificate of weight in evidence.

The Court: Admitted.

Mr. Roos: Objected to as incompetent, irrelevant and immaterial, and hearsay, and not a business

(Testimony of Carl F. A. Johnson.)

record of American President Lines, no opportunity, no foundation laid whatsoever to show that it was accurate.

The Court: Well, then, upon that basis I will strike out the record you put in, because there is nothing to show that that was accurate either. It is the same thing.

The Clerk: Plaintiff's Exhibit 8.

The Court: Do you want your record to remain?

Mr. Roos: The captain identified my record, your Honor. He hasn't identified this.

The Court: All he did was to say that that was the record that was furnished to him by the Japanese checkers.

Mr. Roos: But he identified it. He hasn't identified the weight certificate.

The Court: Well, I am not going to waste any more time on this matter, gentlemen. I will admit that record. [106]

The Clerk: Plaintiff's Exhibit 8 introduced and filed in evidence.

(Weight certificate of Japanese checkers was received in evidence as Plaintiff's Exhibit 8.)

The Court: I don't think the case is going to stand or fall on this. It is half past three in the afternoon and we haven't yet come to the point where we have connected the defendant with this wire here. All we have been talking about is records. I don't think it is going to make any difference whether this record is in evidence or it isn't in evi-

(Testimony of Carl F. A. Johnson.)

dence. I am going to admit it, though, on the ground that it is equally entitled to the consideration of the jury as the other records of the same company which did the checking in the matter.

Mr. Roos: It is not, your Honor, at all. Would you ask the captain if he ever saw that weight certificate?

The Court: I am not admitting it on the ground that the captain had anything to do with it.

Mr. Roos: Who has identified it?

Mr. Petrie: It is a public record.

The Court: It is a part of the record which you, yourself, subpoenaed this morning and asked be produced here by the American President Lines as a part of their records. I am admitting it in evidence.

Mr. Roos: It has never been identified; it is hearsay. [107]

The Court: Well, I am not going to argue about it any more, gentlemen. It is admitted.

Any more questions of this witness?

Mr. Petrie: Your Honor, I would just like to have this witness read the weight on Government's Exhibit 8.

Mr. Roos: The record speaks for itself.

Mr. Petrie: I will read it, then, your Honor. May I?

The Court: All right.

Mr. Roos: I object to counsel reading it. He objected to me reading——

The Court: I have admitted it in evidence, so

(Testimony of Carl F. A. Johnson.)

he is entitled to read it just as you are entitled to read anything that is in evidence.

Mr. Roos: You wouldn't let me read it.

The Court: No; I didn't stop you from reading.

Mr. Petrie: "Certificate of Measurement and/or Weight." By Kobe weighmaster. "The total weight is 21,501 pounds."

I have nothing further from this witness.

Recross-Examination

By Mr. Roos:

Q. Captain, did you ever see this weight certificate before it was shown to you in court here this morning, Plaintiff's Exhibit No. 8, a purported certificate of weight [108] and measurement?

A. I did not. I normally don't see those records.

Q. It is not a record of the President Taylor, is it?

A. It is furnished to the chief officer.

The Court: Are we through with this witness now, gentlemen, finally?

Mr. Petrie: I am, your Honor.

The Court: All right, you may be excused, Captain. Take your records with you.

We will take a brief recess at this time.

(Recess.)

Mr. Petrie: Mr. Press.

SYLVAN JACK PRESS

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Sylvan Jack Press.

Direct Examination

By Mr. Petrie:

Q. Mr. Press, what is your occupation?

A. Now?

Q. First, now, and then I will ask you what you were doing in March, 1957. [109]

A. I work for the Richmond Sanitary Company at the present time.

Q. What were you doing in March, 1957?

A. Working for the Richmond Iron & Metal Company.

Q. What kind of a company is that?

A. That is the buying of salvage.

Q. Buying salvage? A. Yes.

Q. Was the company selling it as well?

A. Buying and selling.

Q. Did you deal in copper wire, among other things? A. Yes, sir.

Q. Now, do you recall——

Mr. Petrie: Your Honor, may I ask another prospective witness to come in for the purpose of identification? That is Mr. Daniels. We don't have him in court because he has been excluded. I think that is the only way this witness can get at it.

The Court: Very well.

(Testimony of Sylvan Jack Press.)

Mr. Petrie: Mr. Daniels, please.

Q. Mr. Press, do you know the defendant, Mr. Teague? A. Mr. Key?

Q. Teague. A. No; I don't know him.

Q. You don't? [110] A. No.

Q. You have been interviewed in connection with this matter by F.B.I. agents? A. Yes, sir.

Q. Do you recall that in the month of March a person came in to see you with regard to some copper wire? A. Yes, sir.

Q. I show you Government's Exhibit 1 in front of you—— A. Yes, sir.

Q. And ask you—with draw that. On that occasion, did you inspect the copper wire?

A. Not to say "inspect"; I looked at it.

Q. Did you look at it?

A. I looked at it because I am merely interested in whether it is copper or whatever it is; but to examine it—automatically I know the grade of copper I look at, and that is all I do in buying.

Q. Where was the copper wire when you looked at it? A. In a station wagon.

Q. What kind of a station wagon, do you recall?

A. That I don't recall. I didn't pay any attention to it at all.

Q. Where was it in the station wagon?

A. In the back end of it.

Q. Was it covered in any way? [111]

A. Partially.

Q. Partially covered with what, Mr. Press?

(Testimony of Sylvan Jack Press.)

A. I believe it was canvas. I believe it was some sort of canvas.

Q. Will you look at these coils of wire that are next to me and tell us, if you can, are these similar in kind? A. Similar in kind, yes.

Q. To the coils that you looked at on that day?

A. Similar in kind.

Q. I am not asking you to say that they are the coils. A. I wouldn't say that it was.

Q. Do you recall the name of the person?

A. I didn't ask him his name.

Q. That spoke to you on that occasion?

A. No; I didn't ask him his name. The only time I ask for a name is if I buy the merchandise.

Q. Do you see him in the courtroom?

A. Yes.

Q. Are you able to recognize and identify the person who brought the wire in on that occasion?

A. Yes, sir.

Q. Point him out, please.

A. The young fellow here.

Q. And is that the person in the blue suit?

A. The young man there, yes. [112]

Q. On what day was that?

A. I don't recall the day.

Q. Can you recall——

The Court: Do you want the witness excluded?

Mr. Roos: Not as far as I am concerned, your Honor.

The Court: Well, you were the one that asked to have the witnesses excluded.

(Testimony of Sylvan Jack Press.)

Mr. Petrie: I think if one is going to be excluded—well, I don't care whether the witness stays or not.

Mr. Roos: It is immaterial to me, your Honor.

The Court: I need a little more from you than that. It was your motion that all the witnesses be excluded. Now all of the witnesses have been excluded. This witness—what did you say his name was?

Mr. Petrie: Mr. Daniels.

The Court: Mr. Daniels was brought in for identification purposes. If you require it, he may be excluded from the courtroom.

Mr. Roos: I have no objection to his remaining in the courtroom.

The Court: All right, go ahead with your examination.

Mr. Petrie: Did you and Mr. Daniels have a discussion about that wire? [113]

A. Yes, sir; as to price.

Q. Was anyone else present?

A. Not when him and I were talking, no; at that time, no.

Q. Where did the discussion take place, in the shop? A. No; outside the building.

Q. Outside the building next to the station wagon? A. Yes; next to the station wagon.

Q. What was the discussion?

A. Well, he asked me my price on it and I stated the price, the price that I would quote him.

Q. What price did you quote?

(Testimony of Sylvan Jack Press.)

A. I don't recollect what it was at that time; somewhere around 30c or something like that. I don't know exactly what it was. That is a year ago, and I don't keep up with those prices. I am not in that business now; he said the price wasn't good enough. He said he should have got more.

Q. Could the price that you quoted him, Mr. Press, have been lower than 30c?

A. It could be lower or higher. All that I could say was the amount that I would give him. I couldn't remember the price that he wanted.

Q. What price was he asking? Do you recall?

A. I don't recollect; a cent or two more than what I was offering.

Q. What else was said by Mr. Daniels? [114]

A. That's all, as far as I remember.

Mr. Roos: I am going to object to what was said by Mr. Daniels as hearsay.

Mr. Petrie: I am not offering it to prove the truth of the statements, but just to show what was said on that occasion.

The Court: If it is not connected up, of course, it would have to be stricken.

Mr. Roos: I am going to object to it as hearsay.

Q. (By Mr. Petrie): Was anything else said by you or Mr. Daniels that you can recall?

A. Not by me, because I was only interested—if I could buy it, okay; if I couldn't buy it, I let it go there.

Q. Did you buy it? A. No, sir.

Q. Before Mr. Daniels left, did anyone else——

(Testimony of Sylvan Jack Press.)

A. Mr. Middleton happened to be in the shed.

Q. Who is Mr. Middleton?

A. Inspector Middleton.

Q. Of the Richmond Police force?

A. Of the Richmond Police. He was there and he came out and saw the material. He took over from there. What happened there I don't know.

Mr. Petrie: Nothing further, your Honor. [115]

Cross-Examination

By Mr. Roos:

Q. Mr. Press, did you take the material out of the station wagon?

A. No, sir; never touched it.

Q. Did you examine it in any way?

A. No, sir.

Q. Even though it was partially covered, you were still able to look at it and see what it was?

A. Because I am accustomed to buying metal, and I knew it was copper when I saw it and the price I could pay for it. That's as far as I went.

Q. For you to see it, it wasn't necessary to remove any covering?

A. No; all I could see was copper. That is all I was interested in, was copper. The price didn't matter. All I was interested in was copper, whether it was bulk, small or big.

Mr. Roos: I think that is all.

The Court: That is all.

Mr. Petrie: Thank you, Mr. Press.

(Witness excused.)

Mr. Petrie: Mr. Middleton, please.

Mr. Roos: I don't know how your Honor ruled, but I will at this time move to strike any testimony of Mr. Press concerning what Mr. Daniels told him as hearsay. [116]

The Court: I will reserve ruling on that motion until all of the Government's evidence is in.

Mr. Roos: Thank you.

ROY SANFORD MIDDLETON

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Roy Sanford Middleton.

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Mr. Middleton?

A. Retired police inspector.

Q. With what police department were you working?

A. City of Richmond, County of Contra Costa, State of California.

Q. Were you working there in March of 1957?

A. I was.

Q. What were your duties in that month?

A. I was assigned to the pawn shop and junk yard details.

Q. And do you recall that on a day in March last year you visited the Richmond Iron & Metal Company?

(Testimony of Roy Sanford Middleton.)

A. I do. It was on the 7th of March, 1957.

Q. Whom did you see there on that [117] occasion?

A. Well, I saw a Mr. William Press—Mr. Jack Press, and, as I was leaving, after checking their records, I met a young man out in the street by the name of Daniels.

Q. You say you met him in the street. Did you overhear any of the conversation between Mr. Daniels and Mr. Jack Press?

A. No; I did not.

Q. After meeting Mr. Daniels, what did you do, Mr. Middleton?

A. Well, as I came out onto the street, I observed Mr. Daniels and Mr. William Press in a conversation.

Q. Don't tell us what they said. A. No.

Q. Just tell us what you did.

A. I then observed some copper wire laying in the back end of a new Chevrolet station wagon.

Q. Was the wire covered or uncovered?

A. It was partially covered by—with a painter's drop cloth or a light piece of canvas.

Q. Did you do anything with that wire?

A. Yes; after I questioned Mr. Daniels, I informed him that due to the large amount of it——

Q. Well, don't tell us what you told him. Did you take possession of the wire?

A. I took possession of the wire at that time, impounded it for safekeeping, for further investigation.

(Testimony of Roy Sanford Middleton.)

Q. Did you take it to the Richmond Police Station? [118] A. I did.

Q. I show you Government's Exhibit 1, Mr. Middleton.

May the witness step down, your Honor?

Have a look at this and tell us if you can identify this wire, Government's Exhibit 2 for identification.

A. To the best of my memory, it resembles very closely that which we impounded on that day.

Q. Did you make any marks on the coils of wire or did you tag it in any way so that you would be able to later identify it? A. No; I didn't.

Q. You did not? A. I did not.

Q. How many coils were there?

A. Five, I believe.

Q. Did you take possession of anything in addition to the coils?

A. Yes; as we were unloading the coils of wire from the station wagon, I observed a shipping tag that fell off of one of the coils, and I also impounded that tag and held that for safekeeping.

Q. Where was that tag? Where did you first notice it?

A. Among the wire on one of the coils. It apparently had been attached; there was a small piece of light wire.

Mr. Roos: I object to that as the opinion and conclusion of the witness. [119]

The Court: "Apparently had been attached" may go out.

Mr. Petrie: That may go out.

(Testimony of Roy Sanford Middleton.)

Q. Where did you find the tag among the wire, on the wire? Was it tied to the wire?

A. No.

Q. Was it resting on the wire? What do you mean by "among the wire"?

A. It was resting on one of the coils of wire.

Q. In the station wagon? A. Yes.

Q. I show you Government's Exhibit 3 for identification and ask you if you can identify that tag?

A. Yes; I can.

Q. How do you identify it? Is that the tag?

A. I remember the one number up in the right-hand corner of the tag in small print, 174.

Q. Did you initial the tag or make any marks on it so that you would later be able to identify it?

A. Not to my memory. I kept it in my possession.

Q. Do you know Agent Barthol of the Federal Bureau of Investigation? A. I do.

Q. Did there come a time when you showed that tag to him? A. I did. [120]

Q. Was that a few days after you took possession of the tag?

A. Yes; it was. I don't recall just how many days; a few days later we were in conversation.

Q. Did there come a time when you delivered the copper wire as well to Agent Barthol?

A. I didn't deliver it; I instructed the Property Clerk of the Richmond Police Department that all the wire in the vault that I had put in there and

(Testimony of Roy Sanford Middleton.)

given Mr. Daniels a receipt for was to be turned over to Mr. Barthol at his request.

Q. Do you know whether or not the wire left the Richmond Police Department?

A. Not to my knowledge.

Q. Where was it stored?

A. In the property vault in the basement of the Hall of Justice.

Q. When did you leave the Department?

A. I left the Department on the first day of July, 1957.

Q. Was the wire still there when you left the Department?

A. To my knowledge. If it had been moved, I knew nothing of it.

Q. What was the last time that you had looked at the wire in that vault?

A. Oh, approximately two weeks or so after I first impounded it.

Q. And was that the last time that you looked at the wire? [121]

A. To my knowledge, yes.

Q. Did Mr. Daniels tell you on that occasion what——

Mr. Roos: Just a second; we will object to the question before it is asked as leading and suggestive, calling for hearsay, not binding on the defendant.

Mr. Petrie: I hadn't finished the question.

The Court: Yes.

Mr. Roos: I think that——

(Testimony of Roy Sanford Middleton.)

The Court: I can't rule on it until I have the question.

Mr. Roos: I will cite the asking of the question as misconduct before it is asked.

The Court: You can't cite something that a fellow hasn't done until he does it. That's a new wrinkle in judicial procedure. Now, what is it you want to ask?

Q. (By Mr. Petrie): Did Mr. Daniels tell you on that occasion what relationship he bore to Mr. Teague?

Mr. Roos: I object to the question as being hearsay.

Mr. Petrie: I will withdraw it. I will call Mr. Daniels.

The Court: Anything else? Are you through with this witness?

Mr. Petrie: I am.

The Court: Any questions? [122]

Mr. Roos: No questions.

Mr. Petrie: That is all, sir.

(Witness excused.)

Mr. Petrie: I am going to call Mr. Daniels next, your Honor, reluctantly, because of the relationship he bears, but that is my next witness.

JAMES E. DANIELS

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: James Edward Daniels.

Direct Examination

By Mr. Petrie:

Q. Mr. Daniels, where do you work?

A. At General Cable & Manufacturing Company.

Q. How long have you worked there, sir?

A. Two years.

Q. Were you working there, then in March, 1957? A. Yes; I was.

Q. Where is that located?

A. It is in Emeryville.

Q. Do you know the defendant, Mr. Teague?

A. Yes; I do.

Q. Do you bear any relationship to him? [123]

A. Yes; I do.

Q. What is that relationship?

A. Stepfather. He is my stepfather.

Q. Do you live at home with Mr. Teague?

A. Yes, sir.

Q. How long have you lived there?

A. Oh, approximately ten years, I would say.

Q. About ten years, you say? A. Yes, sir.

Q. How old are you? A. Twenty-two.

Q. I will ask you, Mr. Daniels, to look at Gov-

(Testimony of James E. Daniels.)

ernment's Exhibit 2 for identification, the coils of copper wire that are next to me. Have you ever seen those before or ones similar in kind if you can't tell that you have seen those particular ones before?

A. Well, yes; I have seen similar in kind.

Q. When? In what month and what year?

A. I don't recall.

Q. You don't recall? Was it this year or was it last year? A. Last year.

Q. Some time in 1957. Can you recall approximately the month of the year?

A. It was in the winter of 1957, I am sure. [124]

Q. In the winter of 1957. Could it have been in March, 1957? A. Yes; it could be.

Q. Where did you first see those coils of wire?

A. In the back of my dad's station wagon.

Q. What kind of station wagon was that?

A. A 1957 Chevrolet.

Q. Where was the station wagon at the time?

A. It was in front of our house.

Q. Can you recall what time of the day or night this was?

A. Yes; it was 8:00 o'clock in the morning.

Q. Eight o'clock in the morning?

A. I had just gotten off work.

Q. Were you alone at the time or was your stepfather with you?

A. I had just come in off work.

Q. Oh, you were working the night shift or something of that sort? A. Yes, sir.

Q. Were you just coming home from work?

(Testimony of James E. Daniels.)

A. Yes, sir.

Q. Where were the coils when you first saw them?

A. They were in the back of the station wagon.

Q. Were they covered or uncovered?

A. I didn't notice. [125]

Q. You say you did not notice whether they were covered or not?

A. Well, they must have been uncovered because I seen the wire. I didn't notice if there was any cover.

Q. Were you using the station wagon at the time? Had you taken the station wagon to work?

A. No, I had not.

Q. Did you just happen to notice them in the station wagon as you were passing by it, or did you go to drive the station wagon somewhere?

A. I was instructed to put a radio in the station wagon.

Q. Who gave you those instructions?

A. My step-father.

Q. After you came home that morning?

A. Yes, sir.

Q. Did your step-father give you any instructions about the wire in the station wagon?

A. No, sir, not in the way of instructions.

Q. Did he say anything to you about it?

A. He just asked me if I might—if I had time to see if I could price it.

Q. Did he tell you that the wire was in the station wagon before you went out to the station wagon—before you saw it?

(Testimony of James E. Daniels.)

A. No, sir, he just mentioned the wire and sort of casual-like said, "If you get a chance"—he never told me to [126] do anything; he just asked me if I didn't have nothing to do, if I got a chance——

Q. To price the wire?

A. To price the wire, yes, sir.

Q. Did he tell you to sell it? A. No, sir.

Q. What did you do after getting into the station wagon? Did you take the wire somewhere to price it?

A. No, sir.

Q. Didn't you take it to the Richmond Iron & Metal Company?

A. The first thing I did was go to J. V. Jones car lot to see about the radio. That was my instructions.

Q. Oh, I see. You did that first?

A. Oh, yes.

Q. Did you get the radio put into the car?

A. No, sir, not that day.

Q. What did you do after seeing about the radio?

A. Well, they told me that they were pretty busy at the shop and they couldn't have the radio put in that day. I think—now, I am not too positive about this, because I had the car two days and I don't know which—the radio I got on the second day. Then I just decided to drive it around a little bit and take it out on the highway. It was a new car and it impressed me quite a bit.

Q. And then what did you do? [127]

(Testimony of James E. Daniels.)

A. I just started driving on the freeway—the Bayshore.

The Court: Did you take the car to the Richmond —what is the name?

Mr. Petrie: The Richmond Iron & Metal Company.

The Court: Did you take it to the Richmond Iron & Metal Company?

The Witness: No, sir, not at first.

The Court: Whether you did it first or second, did you take the car there?

The Witness: Yes, sir.

The Court: Were you there at the Richmond Tire Company?

The Witness: Yes, I was.

The Court: Go ahead.

Q. (By Mr. Petrie): What did you do at the Richmond Iron & Metal?

A. I asked the man in charge how much the copper was worth.

Q. Was that Mr. Jack Press who just testified here a few minutes ago?

A. Yes, that was the man.

Q. What did he say to you?

A. He told me that—he gave a pretty broad statement as to he could pay anywheres from—up to 23 cents or 24 cents a pound—in there.

Q. Did you ask Mr. Press to buy the wire from you? [128]

A. Well, I don't believe I came out with those words, but I kind of meant to give him that im-

(Testimony of James E. Daniels.)

pression, that I was selling the wire, yes, sir. That was the only way I figured I could get an honest price.

Q. Don't you recall that your step-father told you what price you should get for the wire?

A. No, sir.

Q. Don't you recall that he told you that you should get between 30 and 35 cents for the wire?

A. No, sir, I don't recall that at all.

Q. Do you remember discussing this matter with Officer Middleton on March 11, 1957?

A. Yes, sir.

Q. Didn't you tell Officer Middleton on that occasion that that is what your step-father told you about getting 30 to 35 cents for the wire?

A. No, sir, I don't believe I made that statement.

Q. You have no recollection of that?

A. No, sir.

Q. Did you go anywhere else to get a price on the wire besides the Richmond Iron & Metal Company?

A. I had stopped at a place in Oakland.

Q. What place was that, Mr. Daniels?

A. I don't recall. It was down in the industrial section; there were quite a few factories. It happened to be near the freeway. [129]

Q. Did you get a price on the wire at that place?

A. Not on that wire, no, sir. I just asked the man about copper in general, what price he paid for copper. The person there didn't even see it.

(Testimony of James E. Daniels.)

Q. The person at the first place did not see the wire?

A. No, he did not. I just happened to stop by.

Mr. Petrie: That is all.

Cross-Examination

By Mr. Roos:

Q. Jim, you live with your mother and your step-father, Mr. Teague; is that correct?

A. Yes.

Q. Who else lives in the house?

A. My two sisters and at that time my two brothers.

Q. And they are children of Mr. Teague and your mother?

A. Well, sir, I have—I had a half-brother and I have a half-sister, but I have a 17-year-old sister who is completely my sister and a 20-year-old brother.

Q. And since your mother and Mr. Teague were married, he has been the only father you have known; is that correct? A. That is correct.

Q. And this station wagon was brand new, was it? A. Brand new, sir.

Q. Your dad had acquired it the day before, is that right? A. Yes. [130]

Q. That would be March 6th; this was March 7th? A. Yes, sir, that's correct.

Mr. Roos: I have no further questions.

Q. (By Mr. Petrie): Do you know when your father acquired—your step-father acquired the sta-

(Testimony of James E. Daniels.)

tion wagon? Were you with him when he actually took it from the dealer? A. No, sir.

Mr. Petrie: That is all.

Q. (By Mr. Roos): It was the first day that you saw the station wagon, the day before this incident about the wire in Richmond that Mr. Petrie asked you about?

A. I don't recall that, sir. I was working nights at the time and my father was working days and sometimes we would go five or six days without seeing each other. I don't recall when I had seen him.

Q. In any event, this day when you got the instructions to have the radio put in was the first day you ever saw the car? A. Yes, sir.

Mr. Roos: That is all. Thank you.

Mr. Petrie: Thank you.

The Court: Have you got more witnesses?

Mr. Petrie: Yes, your Honor, I do.

The Court: Any short one?

Mr. Petrie: Captain Sledge.

The Court: Is this a short witness? [131]

Mr. Petrie: I think he won't take too long, your Honor.

The Court: All right.

Mr. Petrie: If it does run too long, perhaps we can just interrupt his testimony.

The Court: Very well.

PHILIP D. SLEDGE

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Philip D. Sledge.

Direct Examination

By Mr. Petrie:

Q. What is your occupation, sir?

A. I am chief security officer of the American President Lines.

Q. How long have you held that position?

A. Ten and a half years.

Q. You held that position, then, in March of 1957? A. I did.

Q. Do you know the defendant, Mr. Teague?

A. I do.

Q. Do you see him in court?

A. Yes, sir, sitting there. [132]

Q. Sitting with the lady back there?

A. Yes, sir.

Q. In the blue suit. How long have you known him, Captain? A. Over five years.

Q. Has he been working for American President Lines throughout that time? A. Yes, sir.

Q. In what position, sir?

A. Mr. Teague is a leader man in the hull painting gang.

Q. Where is his office or his shop? Where was it in March of 1957?

(Testimony of Philip D. Sledge.)

A. It is located on Pier 50.

Q. Will you look at the map that we have on the blackboard, Captain, or the diagram; take the pointer and orient yourself—Pier 50 is in the bottom left-hand corner—and show us with the pointer, if you will, where Mr. Teague was working in March of '57.

A. The office that Mr. Teague works from is in the Utility Building.

Q. That is the building at the——

A. That is this building.

Q. You are pointing to a building at the bottom of Pier 50?

A. That is correct, yes, sir. The paint shop——

Q. Pardon me; it is labeled "Utility Building," is it not? [133] A. Utility Building.

Q. You were going to talk about the paint shop?

A. The paint shop where most of Mr. Teague's material is taken from is in the rear of the Utility Building.

Q. Please don't talk about the material. My question was, where was Mr. Teague working on Pier to? In the paint shop? A. No.

Q. Or in the Utility Building? A. No.

Q. Or somewhere else?

A. His work is on the various vessels that are docked alongside of the Terminal.

Q. Are vessels painted every time they come into port?

A. Practically every time, yes.

(Testimony of Philip D. Sledge.)

Q. And this paint group or paint gang does that painting, does it not?

A. They do the hull painting.

Q. The hull painting? A. Yes.

Q. And Mr. Teague is the leader of that group; is that correct? A. That is correct.

Q. When Mr. Teague wasn't painting and he was working, where was he on Pier 50, if he was any place?

A. Various locations within the various sheds on the terminal. It would depend on the nature of the work that they [134] were doing at the time. They have no particular location.

Q. But the paint for the painting was stored in the paint shop at the end of Pier 50?

A. That is correct, sir.

Q. Do you know what kind of car Mr. Teague drove in March of 1957?

A. Mr. Teague had a Chevrolet station wagon.

Q. Do you recall the color, sir?

A. It was white and red—white with red trim.

Q. Can you say whether or not you saw Mr. Teague's station wagon parked on that pier, on Pier 50, on March 6, 1957?

A. Yes, I did see it.

Q. Now, how are you able to say that you saw it on that particular date, Captain Sledge?

A. I noticed cars parked in the evening of March 6th. They were parked actully in what is an illegal zone.

Q. And what is a legal or an illegal zone?

(Testimony of Philip D. Sledge.)

A. It is an illegal zone. I noticed those cars. At the time I didn't stop to examine them.

Q. Did something happen a few days after March 6th to make you go back and check the records to determine the date on which you saw Mr. Teague's car parked down there?

A. It did, sir.

Q. Was some report made to you of a loss?

A. Yes, sir. [135]

Q. On what day was that report made to you?

A. It was made on March the 8th.

Q. Will you show us on the diagram, Capt. Sledge, where Mr. Teague's station wagon was parked on Pier 50 on the night of March 6th?

A. When I observed the station wagon, it was parked approximately at this location. This is a bulkhead directly in front of the Utility Building.

Q. Of the Utility Building? A. Yes, sir.

Q. Please return to your seat. After you received that report of loss, Captain, did you have a discussion with Mr. Teague about the loss?

A. I did.

Q. When and where did that discussion take place?

A. In my office at Pier 50 on the afternoon of March 8th, at approximately 4:00 o'clock.

Q. Was anyone else present besides yourself and Mr. Teague?

A. Yes, sir. Two of my sergeants were in the office at that time.

Q. What are their names?

(Testimony of Philip D. Sledge.)

A. Sgt. Foley and Sgt. Murphy.

Q. Going back to the station wagon a minute, Capt. Sledge, what time of the day or night did you notice the station wagon?

A. It was after 7:00 o'clock; I would say approximately 7:30. [136]

Q. How are you able to fix the time, sir?

A. I had checked the President Taylor which was working at Pier 50-C and I had done so after the night gang had begun working. That would be at 7:00 o'clock at night.

Q. Will you show us where Pier 50-C is on the diagram where the President Taylor was working?

A. This is Pier 50-C. The Taylor was docked alongside.

Q. Did you notice any wire on the pier on that occasion? A. Not on the pier itself.

Q. Did you notice some copper wire on that occasion? A. I did, sir.

Q. Where was the wire stored?

A. The wire was stowed in back of Pier 50-C.

Q. Show us on the map again where that was?

A. It was on the outside of the shed area in approximately this location.

Q. Was other cargo stored in that place as well?

A. Some oil drums were stored there.

Q. Anything else there?

A. No, sir, not to my knowledge.

Q. Now, coming back to the discussion with Mr. Teague in your office, tell us as best you can recall what you said and what Mr. Teague said and what

(Testimony of Philip D. Sledge.)

anyone else said in Mr. Teague's presence on that occasion.

Mr. Roos: To which we are going to object, [137] if your Honor please, on the ground that it is hearsay, not binding on the defendant. If it is the intention to show any admissions of the defendant, I am going to object that no corpus delicti has been proved in this case.

The Court: I will overrule the objection.

The Witness: I had received a report——

Mr. Petrie: Don't tell us what the report was.

The Court: Just what was said between you and the defendant.

The Witness: I asked Mr. Teague to come to my office. When he did so, I told him that I had received a report on some missing copper wire and asked him what he knew about it.

Q. (By Mr. Petrie): What did he say?

A. His first remark is, "Where is my wire and when am I going to get it back?" I told him that I didn't know, but I would be interested in hearing how he acquired the wire.

Q. What did he say?

A. Mr. Teague said that he had found the wire on the street.

Q. Did he tell you on what street he found the wire? A. Yes, sir.

Q. On what street?

A. He told me he had found the wire on Berry Street.

(Testimony of Philip D. Sledge.)

Q. Will you return to the diagram, Captain, and point out [138] Berry Street on the diagram?

A. This is Berry Street (indicating).

Q. That is the street running diagonally in the upper right-hand corner of the diagram, is it not?

A. Yes, sir, it runs off of Third Street.

Q. Did Mr. Teague tell you where on Berry Street he found the wire? A. He did, sir.

Q. Where? Can you point out again on the diagram?

A. I asked where he had found the wire, and he told me on Berry Street. I asked where, and he said approximately 150 or 200 feet off Third Street. That would make it about in this location.

Q. Will you mark that location with "T-1," a large "T-1"?

A. (The witness marked on the diagram.)

Q. And did he tell you where the wire was at the time he found it? Was it in the street or on the sidewalk?

A. He said the wire was in the street.

Q. In the street? A. Yes, sir.

Q. Were all the coils of the wire together?

A. So he stated.

Q. Did Mr. Teague tell you anything else about finding the wire?

A. Only that he was on his way home, and, as he turned off [139] Third Street, saw this wire, stopped and picked it up.

Q. Was there any further discussion between you

(Testimony of Philip D. Sledge.)

and Mr. Teague on this occasion at your office about the wire?

A. I asked Mr. Teague if he knew that this wire was part of a cargo that had been in custody of the company.

Q. What did he say?

A. He said that he did not.

Q. Was anything else said between you and Mr. Teague on this occasion about the wire?

A. I told Mr. Teague that we had reason to believe that the wire in question was cargo, was part of a foreign shipment, and it was my intention to report the information in my possession to the F.B.I.

Q. Did Mr. Teague say anything else to you on that occasion about the wire?

A. Nothing except to repeat the story that he had found the wire on the street.

Q. On Berry Street? A. Yes, sir.

Q. Did he tell you what time in the evening it was when he found the wire going home?

A. I don't believe the time was mentioned at that time, sir.

Q. Did he tell you what time of day it was when he went home, whether it was afternoon or [140] evening?

A. No, he said he found it that night on his way home.

Q. You have told us all that you can recall about the discussion?

A. All that I recall, yes, sir.

Mr. Petrie: I have nothing further.

(Testimony of Philip D. Sledge.)

The Court: I guess you want to have some cross-examination.

We will take a recess until tomorrow morning at 10:00 o'clock, members of the jury. I hope it will cool off a little bit in the morning. It is very hard to get any ventilation in here. It may be that our favorite fog will be in by tomorrow morning. Will you please come back tomorrow morning at 10:00 o'clock?

(Recess to Wednesday, September 17, 1958, at 10:00 o'clock a.m.) [141]

Wednesday, September 17, 1958—10 A.M.

The Clerk: United States versus Edgar Harold Teague for further trial. Philip D. Sledge on the witness stand.

PHILIP D. SLEDGE

called as a witness by the Government, being previously sworn, resumed the stand and testified further as follows:

The Court: The direct examination has been finished?

Mr. Petrie: Yes, your Honor.

Cross-Examination

By Mr. Roos:

Q. Mr. Sledge, I understand that you have been Chief Security Officer for A.P.L. for the past ten and a half years; is that correct?

A. That is correct, sir.

(Testimony of Philip D. Sledge.)

Q. What do your duties consist of in that job?

A. The security of A.P.L. terminals and vessels in the San Francisco Bay Area. I have charge of the guard service.

Q. And part of that is security of cargo after it has been delivered to the dock or after it has arrived at the dock? A. Yes, sir.

Q. And I presume the security system that was set up there was set up by you; is that correct?

A. Yes, sir. [142]

Q. And it is set up to prevent pilferage from the docks, or is that one of its purposes?

A. Yes, sir.

Q. There has been no change, I take it, in the general physical conditions of Pier 50 that are outlined on that diagram on the board there since between March of 1957 and the present, has there? Is the physical setup generally the same?

A. I believe so, sir. Any changes has been very minor.

Q. I would like to show you a number of pictures, Mr. Sledge. Would you say that this picture is a fair representation in general of the parking area which appears on this diagram to be labelled "Depressed Area"?

A. Well, this picture does not show the parking area as a whole, sir. It shows a part of it.

Q. But it is a fair representation of the portion that it does show, is it?

A. Of a portion of it, yes.

Q. And the portion that it shows—correct me if

(Testimony of Philip D. Sledge.)

I am wrong—would be generally this portion running down along the side of Shed C where this station wagon was parked?

A. It would seem to be so.

Q. And this is the Utility Building along here, is it, this building behind the parked automobiles?

A. No, I don't believe it is.

Q. What is it, then? [143]

A. This view is taken from the valley parking area?

Q. No, I asked you if that is a view of the parking area and if this shed behind the many automobiles is——

A. This is not the Utility Building; this is a view of one of the sheds.

Q. What shed is that?

A. From the angle in which this picture is taken, it is difficult to say.

Q. Can you orient yourself from the railroad tracks to the left of the picture?

A. This appears to be one of the sheds; I would say 50-D. It definitely is not the Utility Building.

Q. Where on the diagram do the double line of railroad tracks run?

A. The double line on the valley side, as we know it, of each shed—double lines of tracks along Shed D, double lines of track along Shed C and there are also double lines of tracks on the stern of this ship you see.

The Court: I didn't hear what you said.

The Witness: There are double lines of tracks

(Testimony of Philip D. Sledge.)

on the stringer sides of each pier as well as the valley side.

The Court: Then you identify this shed as Shed D, is it?

The Witness: No, I do not. From the angle in which this picture is taken, I say it doesn't appear to me, but [144] it does appear——

Q. (By Mr. Roos): What is the building at the back of it?

A. That appears to me to be the Utility Building. It is a very poor picture, but I would say this is the Utility Building.

Q. And then this building on the other side of the freight cars would be what?

A. Apparently Shed C.

Q. All right. Would you mind marking on the picture with an arrow and write "Shed C" upon what you say is Shed C?

A. I can't definitely say that it is from that picture. I can only say that it is a very poor picture. It does not show the area at all in its true relation one to the other.

Q. But it does show a portion of the parking area, though?

A. It shows a portion that could be our parking area; I can't definitely state that it is.

Mr. Roos: We will mark this for identification, may we, at this time?

The Clerk: Defendant's Exhibit G marked for identification.

(Testimony of Philip D. Sledge.)

(Photograph of parking lot was marked Defendant's Exhibit G for identification.)

Q. (By Mr. Roos): Can you identify this picture for us, Captain? [145]

A. Yes, sir, the sign in the picture is over the main entrance to Pier 50, our terminal. The structure in the center is our gate shack or guard shack at the entrance to the terminal.

Q. And that picture is a picture of the entrance to your terminal; is that correct?

A. That is correct.

Q. Taken from the outside looking in?

A. Yes, sir.

Q. And that is a fair representation of what it purports to be, is it not? A. Yes, it is.

Mr. Roos: We will offer this as defendant's next in evidence.

Mr. Petrie: No objection.

The Court: Defendant's Exhibit H introduced and filed into evidence.

(Photo of A.P.L. Terminal and gate received in evidence as Defendant's Exhibit H.)

Q. (By Mr. Roos): And I will show you this picture and ask you if that is a fair representation of the same subject matter as in Defendant's H in evidence taken from the inside looking out?

A. Yes, sir, it is.

Mr. Roos: Thank you, sir. May this be ad-

(Testimony of Philip D. Sledge.)

mitted [146] your Honor, as defendant's next in order?

Mr. Petrie: No objection, your Honor.

The Clerk: Defendant's Exhibit I introduced and filed into evidence.

(The photo referred to was received in evidence as Defendant's Exhibit I.)

Q. (By Mr. Roos): And to the right of this photograph, Captain, there is a sign that only partially appears in the picture. Does that sign in full read "All vehicles must stop for inspection"?

A. That is correct. It reads "All vehicles must stop for inspection." On the one side and on the opposite side, "Must stop for directions."

Q. And the "All vehicles must stop for inspection" side is faced so that vehicles going out of the pier see that side? A. Correct, sir.

Q. And I will show you another picture and ask you if that is the same general area looking out of the A.P.L. terminal but taken from a point farther inside the terminal than the last picture.

A. Yes, sir, it is. This appears to be taken from the area between Sheds B and D, approximately the center portion of the terminal as you face the gate.

Mr. Roos: Thank you. I will offer that as defendant's next in order. [147]

Mr. Petrie: No objection.

The Clerk: Defendant's Exhibit J introduced and filed into evidence.

(Testimony of Philip D. Sledge.)

(The photo referred to was received in evidence as Defendant's Exhibit J.)

Q. (By Mr. Roos): This parking area at that pier is the area which is labeled on this diagram "Depressed Area," is it not? A. Yes, sir.

Q. And that area accommodates several hundred cars, would you say?

A. We have parked as many as 350 cars there on occasions. It depends, of course, upon conditions. That is occasionally used for cargo as well as for parking purposes.

Q. And this shack that appears in the approximate center of Defendant's Exhibit H, that is a shack for the watchman; is that correct?

A. Yes, sir.

Q. And there is a watchman on duty in that shack 24 hours of each and every day, is there not?

A. Yes, sir.

Q. And that was true also in March of 1957?

A. It was.

Q. All of that parking area is private property of American President Lines, is it not? [148]

A. Yes, sir.

Q. I believe you testified in response to a question Mr. Petrie asked you—he used the term rather than yourself; he said, "Did you receive a report of loss on March 8, 1957?" And you said, "Yes." What you meant was that you received a report or an inquiry from the F.B.I. concerning these coils of copper wire, is that correct? A. No, sir.

(Testimony of Philip D. Sledge.)

Q. You did not? A. No, sir.

Q. Did you receive it from the Richmond Police Department? A. No, sir.

Q. Do you have the report that you received?

A. The report was given to me verbally by one of our company officials, the original report.

Q. The original report was given, and do you know where he received the report?

A. I know what he told me at that time, yes.

Q. And he told you at the time that he received it from the F.B.I., didn't he?

A. No, sir, he did not.

Q. Or from the Richmond Police Department?

A. No, sir.

Q. He did not? A. No, sir. [149]

Q. Did you ever receive any written report from anyone? A. On the subject of this wire?

Q. Yes. A. No, sir, I did not.

Q. To your knowledge, Mr. Sledge, Federated Metals has never made any claim to the ownership of the wire which is in evidence as Plaintiff's Exhibit 2, has it?

Mr. Petrie: I will object to it as irrelevant, your Honor.

The Court: Sustained.

Q. (By Mr. Roos): To your knowledge, Mr. Sledge, has the ultimate consignee in Japan ever made any claim to American President Lines that it is the owner of the wire admitted in evidence?

Mr. Petrie: I will object to that as irrelevant, your Honor.

(Testimony of Philip D. Sledge.)

The Court: Made any claim—would you read the question?

(Question read by the reporter.)

Mr. Roos: May I rephrase the question, your Honor?

Q. To your knowledge, Mr. Sledge, has the ultimate consignee in Japan—that is the ultimate consignee of the shipment of copper wire shipped aboard the President Taylor on or about March 7 of 1957, ever made any claim that it was the [150] owner of the five coils of copper wire which are Plaintiff's Exhibit No. 2?

Mr. Petrie: I will object to that as irrelevant, your Honor.

The Court: Claim to whom?

Mr. Roos: Claim to American President Lines or any other person, to your knowledge.

The Court: Sustained on the ground that it is calling for hearsay.

Mr. Roos: I am asking for his own knowledge, your Honor.

Q. Have you ever received a claim?

The Court: You may ask him if he ever got a claim.

Q. (By Mr. Roos): Did you ever receive a claim from the ultimate consignee in Japan of the shipment of wire aboard the President Taylor that it claimed to be the owner of these five coils of copper wire?

(Testimony of Philip D. Sledge.)

A. No, sir; that wouldn't come under my jurisdiction.

Q. Have you ever received such a claim from Brandeis, Goldschmidt & Co., Inc.?

A. I have never personally received a claim.

Q. Have you ever received such a claim from Federated Metals, the vendor of the wire?

A. Not personally.

Q. Have you ever received a claim from any insurance company? [151]

A. Not personally.

Q. Does A.P.L. claim to own this wire?

The Court: Sustained. It calls for hearsay.

Mr. Roos: I am sorry; you're right.

Q. Do you know——

The Court: If you want to get any data of this kind in, you have people subpoenaed here from American President Lines. You are wasting time asking a man who has nothing to do with it except to guard the premises about matters of this kind. He can't know about it.

Q. (By Mr. Roos): Do you know whether or not A.P.L. claims to own the wire that is in evidence here, Plaintiff's Exhibit 2?

The Court: Sustained on the ground that it is hearsay.

Mr. Roos: If he knows, your Honor, it isn't hearsay.

The Court: He can't know except from what somebody told him.

(Testimony of Philip D. Sledge.)

Mr. Roos: It is a corporation, your Honor. It can only act through its agents.

The Court: Let's not waste time on it. That is obvious. Every lawyer knows that. It is just taking up time. I am not stopping you from inquiring into this matter, but not through this witness.

Q. (By Mr. Roos): Has any person other than the [152] defendant Edward Teague to you personally ever claimed to be the owner of this wire, the wire in evidence as Plaintiff's Exhibit No. 2?

A. No, sir.

Q. On March 6, 1957, how many vessels were docked at the A.P.L. terminal?

A. I don't recall the number. We had one vessel that I am sure of, the President Taylor. That is the only one I can be sure of.

Q. Was it the only vessel, or do you know whether there was one or more other vessels?

A. There may have been other vessels. We frequently have as many as five at the terminal.

Q. How many people were employed in the vicinity of Pier 50 by A.P.L. on that date, roughly?

A. I couldn't estimate that accurately, sir.

Q. It would be in the hundreds, wouldn't it?

A. It depends upon the time you have reference to; it would vary from hour to hour.

Q. What was the largest number of people that you would estimate were employed on or around Pier 50 on March 6, 1957.

A. I couldn't estimate that without having access to records. Our employees down there are casual

(Testimony of Philip D. Sledge.)

employees ordered in as we need them. We may have 350 or 400 in one day and ten the next. [153]

Q. The President Taylor was loading that day, was it? A. Yes, sir.

Q. So there would be the ship's crew on board, would there not?

A. There would be a skeleton crew.

Q. And there would be a full crew of longshoremen? A. I believe so.

Q. And there would be all the regular office and other employees of American President Lines?

A. During the day hours there would be.

Q. And if there were any other crews there, there would be the ship crews of those vessels?

A. Yes, sir.

Q. And possibly also longshore crews working aboard those vessels?

A. If there were other vessels working at that particular time.

Mr. Roos: Just a moment, your Honor.

Q. I presume, Captain, American President Lines has strict rules concerning honesty of its employees? A. Yes, sir.

The Court: Sustain the objection. That is not a subject the jury can properly consider. What is meant by "strict rules"? What information does that give the jury? I will sustain the objection. [154]

Mr. Roos: I have nothing further. Thank you.

(Testimony of Philip D. Sledge.)

Redirect Examination

By Mr. Petrie:

Q. Will you show us on the diagram, sir, where the guard house or guard shack is at the main entrance to Pier 50?

A. This structure here, sir.

Q. Is that structure labeled in any way on the diagram? A. Yes, it is, "Guard House."

Q. Guard House? A. Yes, sir.

Q. Will you show us again where you saw the defendant's car, station wagon, on the night of March 6th?

A. In approximately this location (indicating).

Q. In front of the Utility Building?

A. In front of the Utility Building, I would say.

Q. How far is it, approximately, from the guard house to the place where you saw the defendant's car? A. It is approximately 1,700 feet.

Q. You have marked with a W-1 the spot where the wire was stored——

Mr. Roos: I am going to object to this, your Honor, as improper cross-examination. He is merely rehashing the direct testimony, your Honor.

Mr. Petrie: I am not, your Honor.

Mr. Roos: I didn't go into this matter. [155]

Mr. Petrie: Mr. Roos asked if there was a guard on duty 24 hours a day. I suppose he is going to argue from that that the guard should have seen

(Testimony of Philip D. Sledge.)

the wire being taken. I want to show that the wire and the defendant's car were a long ways from the guard house. I think it is proper redirect.

The Court: You have established the fact, he says 1,700 feet.

Mr. Petrie: Yes, to the car, your Honor.

The Court: What was the other question?

Mr. Petrie: I am going to ask Capt. Sledge how far it is from the guard house to where the wire was stored at that time.

The Court: Go ahead.

Q. (By Mr. Petrie): How far is that?

A. The wire was stowed in back of Pier 50-C, in the rear of the southeast corner of the pier. You mean the distrance from the guard shack to the wire?

Q. The distance from the guard shack. Is it also about 1,700 feet, or is it something else?

A. It would be a bit farther than that, sir; I would say approximately 1,850 feet, perhaps.

Q. How far is it from where the defendant's station wagon was to where the wire was stored?

A. Approximately 150 feet.

Q. Was the wire stored in a place that was higher than the [156] place where the car was parked? A. Yes.

Mr. Roos: Object to this, your Honor. This is improper cross-examination.

The Court: It isn't cross-examination; this is redirect.

(Testimony of Philip D. Sledge.)

Mr. Roos: I mean improper redirect examination.

The Court: I will overrule the objection.

Q. (By Mr. Petrie): Was the car parked in the depressed area? A. It was, yes.

Q. How depressed is that area, Captain? Can you describe it for us?

A. Well, we call it a depressed area because the area itself is lower than the floor of the shed structure.

Q. How much lower?

A. Approximately—I would say it varies; I would say approximately five feet.

Q. Now, from what portions of the pier can you drive a car into the depressed area or can you drive out of the depressed area with a car?

A. You can drive from any of the main gates of the piers. Each pier has a main gate located on the east and the west ends. You can drive an automobile out of any of those gates.

Q. Let me ask the question in this way: How far is it [157] from where the wire was stored to the beginning of the depressed area as to the nearest point of the depressed area?

A. May I point that out on your chart?

Q. Yes, will you, please?

A. This is the east end of Shed C. The wire was stowed approximately here on the southeast corner of the shed. The parked car, when I observed it, was here. I estimate the distance between the two to be approximately 150 feet.

(Testimony of Philip D. Sledge.)

Q. Yes, and I am now asking you how far over does the depressed area extend? What is the closest point in the depressed area to the point where the wire was stored?

A. The depressed area goes over to the southern corner of Shed C. There is a slight incline or ramp.

Q. Can you drive a car up that ramp?

A. Oh, yes.

Q. I show you Defendant's Exhibit I and call your attention to that sign again, "All vehicles must stop for inspection." Is that sign facing inward to Pier 50? A. Yes, sir.

Q. To what vehicles does that sign apply?

Mr. Roos: To which we object, your Honor, as calling for the opinion and conclusion of the witness. The sign will speak for itself.

Mr. Petrie: I will rephrase it, your Honor.

The Court: All right. [158]

Q. (By Mr. Petrie): In March of 1957, was it the practice for the guard in that guard house to stop cars of employees?

Mr. Roos: To which we also object, your Honor, on the same ground; it calls for an opinion and conclusion and it is incompetent, irrelevant and immaterial.

Mr. Petrie: He is the Security Officer.

The Court: I will overrule the objection.

Mr. Roos: He can't testify as to what some guard's practice might have been. It is hearsay, also.

The Court: He is the supervisor in charge of it.

(Testimony of Philip D. Sledge.)

He knows what—at least he says he does. Overruled.

Q. (By Mr. Petrie): Do you have the question in mind, Captain?

A. The guards did not stop all vehicles. They have orders to stop all trucks leaving the terminal area and inspect them. Private automobiles, no.

Mr. Petrie: That is all I have.

Recross-Examination

By Mr. Roos:

Q. Mr. Sledge, your guards have instructions to make spot checks of the automobiles and vehicles driven by employees, do they not?

A. They do at the present time, yes, sir.

Q. And they did in March of 1957? [159]

A. No, sir, they did not.

Q. When did that rule go into effect?

A. The rule originally went into effect in 1953, sir. It was discontinued in the summer of 1954 and again became effective in August of 1957.

Q. And was that put into effect and taken out of effect by any written directives given to the guards? A. Yes, sir, it was.

Q. Do you have copies of those?

A. Yes, sir.

Q. Do you have them with you, sir?

A. No, sir, I do not.

Q. Didn't your guards have instructions from you in March of 1957, to stop any automobile, par-

(Testimony of Philip D. Sledge.)

ticularly in the late night hours, which might be leaving with a load of material in it?

A. Certainly, sir.

Q. They did——

A. A load of material, of course. We require passes for any materials taken off the terminal, if we are aware of it.

Q. And that was true in March of 1957?

A. Yes, sir.

Q. It is a fact, is it not, Mr. Sledge, that there is no possible way for a motor vehicle to drive off of Pier 50 from the so-called depressed area out to Mission Rock Street or China Basin Street without going past the guard house at the [160] gate which was shown there on that diagram and in these pictures?

A. No, it isn't impossible, sir. The physical layout of the terminal is such that both Sheds A and B have main gates that open directly onto the street area. Those are usually kept secured.

Q. And other than that, the area depicted there of those four sheds and the depressed area is surrounded by water on three sides?

A. That is correct.

Q. And on the land side there are these locked gates and a wire fence; is that correct?

A. That is correct, sir.

Q. Who has keys to these locked gates?

A. I have keys to all locks within the terminal area. Those are kept in a security office. My guards

(Testimony of Philip D. Sledge.)

at the main gate have keys to those street gates that you refer to.

Q. Those are the only persons who have keys to those gates? A. That's correct.

Q. And was correct in March of 1957?

A. Yes, sir.

Q. On what date did the President Taylor sail from San Francisco in March, early——

A. The President Taylor shifted from our terminal over to the Oakland Army Terminal, I believe the date was March 8th.

Q. And it went over to the Oakland Army Terminal? [161] A. Yes, sir.

Q. On March 8th; and how long did she remain there?

A. Approximately 24 hours. As I recall it, it sailed on March 9th.

Q. And you say the matter of this copper wire was first reported to you by another official in A.P.L. on March 8th?

A. That is correct, sir.

Q. And I presume you made an inspection aboard the vessel on March 9th over at the Oakland Army Base to run this thing down?

A. No, sir, I did not.

Q. You did not? A. No, sir.

Mr. Roos: I have no further questions.

Mr. Petrie: Nothing more. Thank you.

The Court: That is all.

(Witness excused.)

Mr. Petrie: Mr. Schearn.

JOHN SCHEARN

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court and to the jury?

The Witness: My name is John Schearn. [162]

The Clerk: Please spell your last name.

The Witness: S-c-h-e-a-r-n.

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Mr. Schearn?

A. Clerk—shipping clerk.

Q. Out of what office do you work?

A. Out of Local 134.

Q. Where is that located?

A. That is at Pier 1½ on the Embarcadero.

Q. And were you doing the same work in March of 1957? A. That's right.

Q. What are your duties generally? How are you assigned?

A. Well, I check cargo to a ship, sort cargo on the dock from a ship, and sometimes receive cargo.

Q. Are you assigned from that Local to a number of companies, depending on where the need is?

A. That's right; I go to several of them.

Q. Have you checked cargo from time to time for American President Lines? A. I have.

Mr. Petrie: May this clerk's hatch report, your Honor, be marked Government's Exhibit, I believe it is, 9 for identification?

(Testimony of John Schearn.)

The Clerk: Plaintiff's Exhibit 9 marked for identification. [163]

(Clerk's hatch report was marked Plaintiff's Exhibit 9 for identification.)

Q. (By Mr. Petrie): I show you a yellow copy of a dock receipt among papers that are Defendant's Exhibit A for identification, Mr. Schearn, and I ask you if you recognize that paper.

A. Yes, I do.

Q. Does your signature appear at the bottom of it, sir?

A. That's right.

Q. And there are some other notations together with your signature, are there not?

A. That's right.

Q. And there are some other notations, together with your signature, are there not?

A. That's right.

Q. Can you tell us how you came to sign that paper and make those notations? What were you doing at the time?

A. This time I was loading coils of copper wire and I was loading in No. 4 hatch.

Q. Aboard what ship, do you recall?

A. The President Taylor.

Q. On what date did that loading take place?

A. That was in March; about a certain date—I don't know; about March——

Q. Don't guess, if you can't tell from that document what day it was. Do you recall where the coils were located on [164] the pier?

(Testimony of John Schearn.)

A. They were out in the back of the pier, outside Pier 50-C. They were on the front end.

Q. Address yourself to this diagram, Mr. Schearn. That is Pier 50 in the bottom left corner. Can you use the pointer and tell us where the coils were located? Would you say that they were at the end of Shed B?

A. I am trying to find "C"—50. About out here in—I am trying to figure where the parking area is.

Q. Do you find Shed C on the diagram?

A. Here is Shed C.

Q. Now, where were the coils located with reference to Shed C? A. At the outside.

Q. You are pointing to the corner of said Shed C. Was that the approximate location of the coils?

A. Outside.

Q. At the end of said Shed C?

A. The open area.

Q. At the end of the pier? A. Yes.

Q. How were the coils stored?

A. They were on pallet boards. They were lined up one high and they had these coils on the pallets.

Q. Can you tell us how many coils there were to a pallet? [165]

A. No; it is pretty hard to get the exact amount because, on a pallet, they don't put the same amount to a load. You get like a lot of coils there, it is hard to count them. All you can do is kind of take an estimate. You count about how many you figure on

(Testimony of John Schearn.)

a board; then you count the number of boards and you figure how much your tag calls for.

Q. By "tag," what do you mean?

A. 186. This tag calls for 186.

Q. What tag are you talking about?

A. This pile tag. This pile tag was right in front of the coils and I pulled that off the pile.

Q. Are you referring to the yellow copy of the dock receipt?

A. Dock receipt, yes. And then I take that off the pile and I see, well, this calls for so many, 186. And then I count them as near as I can because you can't get an accurate count on a pallet board, so you get approximate amounts so you make sure that you got them all in that one section, in the small place on the dock. Then you tell the lift driver to take them and he picks them up on the lift and takes them to the hatch.

Q. At the time that you count for loading, do you have before you the dock receipt showing the number of coils received at the pier?

A. That's right.

Q. By American President Lines? [166]

A. That's right.

Q. I show you next Plaintiff's Exhibit 9 for identification and ask you if you can identify that?

A. That is the hatch list, to keep a record of the time the gang I was with, from the time they start until the time they finish.

Q. Is that signed by you?

A. Yes, signed down here on the bottom.

(Testimony of John Schearn.)

Q. Does that hatch report cover the coils of copper wire?

A. Yes, it says from 10:45 to 12:00 midnight, loaded 186 coils of copper scrap, 22,000 pounds, 11 tons.

Q. Where did you get the figure "22,000 pounds"?

A. That is right on the tag, "186 coils, 22,000 pounds."

Q. Does that hatch report also cover other items that were loaded at about the same time?

A. Yes, it shows everything. After that, I loaded other cargo on.

Q. Don't tell us what the other items were, but does it also include other items?

A. It includes everything I loaded that night.

Q. Where did you get the figure "186" that you put on the hatch report, Mr. Schearn?

A. I got the 186 from this pile tag, from this dock receipt here.

Q. When those coils were loaded aboard the President Taylor, [167] were you present?

A. I was.

Q. Did you make your count at that time or at some earlier time?

A. I make it just before—before they take it to the ship, I got to get a count.

Q. I show you next Plaintiff's Exhibit 6 for identification, which is a green copy of a dock receipt, and I call your attention to some figures and letters in blue pencil at the bottom of that. Do

(Testimony of John Schearn.)

you recognize those notations? Are they in your handwriting, Mr. Schearn?

A. Those are not. No, those are not in my handwriting. Those are copied off this yellow copy here.

Q. Were you present when they were copied off the yellow copy?

A. This here, no; I don't know anything about this one.

Q. Did you at any time, in connection with this count of the coils loaded aboard the President Taylor, count each individual coil?

A. No, that's impossible. The only thing you can do——

Q. When were you first contacted by any agent of the Federal Bureau of Investigation in this matter, Mr. Schearn? A. This morning.

Q. By which agent?

A. I think a Mr. Burroughs. [168]

Q. When were you first contacted by anyone from American President Lines in connection with this matter? A. This morning.

Q. You talked with me this morning about it as well, did you not? A. That's right.

Q. In my office? A. That's right.

Q. That was the first time that we discussed it?

A. That's right.

Mr. Petrie: That is all.

(Testimony of John Schearn.)

Cross-Examination

By Mr. Roos:

Q. Mr. Schearn, you have been a ship clerk, is it?

A. That's right.

Q. For a good number of years, have you not?

A. That's right.

Q. About how long?

A. About 15 years—from 1943 until the present time.

Q. And what are the duties of a ship clerk?

A. A ship clerk receives cargo. A ship clerk delivers cargo. In other words, he receives it from teamsters or from freight cars, and he delivers cargo that is discharged from a ship, and he loads—he checks cargo to a ship.

Q. And do you know Mr. Delehanty? Is he a ship's clerk? [169]

A. I don't know him personally, but——

Q. Do you know of him?

A. I don't know him personally; I don't.

Q. In the general operation of this business when the truck delivers a load of cargo to the dock, one ship's clerk checks it from the delivery truck onto the dock; is that right? A. That's right.

Q. And counts it? A. That's right.

Q. And then a second ship's clerk, or maybe the same one, but if a day or so elapses, another ship's clerk will then check it from the dock into the hold of the ship; is that right?

A. Well, the cargo is received, that's right, by

(Testimony of John Schearn.)

—and it is put on the dock, and sometimes they load it direct or put it on pallet boards, what they call palletizing. They have a palletizing gang and they palletize it and put it on boards, and then it can be loaded on the ship the next day or any time after that.

Q. Do you have any independent recollection of loading this wire aboard the President Taylor?

A. I remember that.

Q. You have loaded a lot of ships before and after that time, haven't you? A. I have.

Q. Do you specifically remember this particular job? [170] A. I do.

Q. Is there anything about this that made it particularly stand out in your mind?

A. Well, one reason is is it's—I wouldn't load much—wire would be kind of a—you wouldn't load it many times; maybe you wouldn't load it again this year, and then sometimes I might load it—as far as I recollect, that is the only time I remember, and I remember this—like I say, I happen to remember this because it was out on the bulkhead and something, you know, left an impression on my mind.

Q. This particular wire, did part of your gang put it on pallets?

A. No, it was already palleted.

Q. It was already on pallets. Whose job would that be to put it on pallets?

A. The palletizing gang. That was done previously.

Q. The palletizing gang—who does that, long-

(Testimony of John Schearn.)

shoremen, checkers—— A. Longshoremen.

Q. And part of your job as a ship's clerk in checking it aboard the ship would be to report any shortage that he might discover, wouldn't it?

A. If he noticed any shortage, yes; that's right.

Q. That's part of your job?

A. Yes, if you notice any. [171]

Q. Now, I understand that when this material is put aboard pallets, one large coil—I withdraw that. When it is put aboard pallets, a small coil—a coil that is small in diameter like this one, you see?

A. Yes.

Q. That could get hidden inside of a coil that is large in diameter, couldn't it?

A. It could, yes.

Q. On a pallet? A. That's right.

Q. And that is the reason you say it is awful hard to get an accurate count when stuff is set on pallets?

A. Yes, it's hard to get an accurate count.

Q. For the reason that I have mentioned?

A. That's right.

Mr. Roos: If I may, your Honor, I am taking out this one document with this witness' signature from the mass of papers that is Defendant's A for identification.

Q. This yellow dock receipt which Mr. Petrie showed you, that bears your signature, John Schearn? A. That's right.

Q. And "March 8, '57," is that in your handwriting? A. That's right.

(Testimony of John Schearn.)

Q. And this "186," is that in your handwriting?

A. That's right. [172]

Q. And how about these other——

A. That's my handwriting.

Q. Could you explain to us what these other numbers are?

A. Well, "Lot 4094" is—well, every commodity you load on a ship, you give it a lot number, and they put that on a plan or stowage list so that, when the cargo gets on the other side, they can refer to this lot on a plan. It would be Lot so-and-so, and Hatch No. 4, 186 coils. And this is stowed "4, upper 'tween deck, starboard wing"—that is where it was stowed in the ship.

Mr. Roos: May I offer this in evidence as defendant's exhibit next in order?

Mr. Petrie: No objection.

The Clerk: Defendant's Exhibit K introduced and filed into evidence.

(Yellow dock receipt was received in evidence as Defendant's Exhibit K.)

Q. (By Mr. Roos): And when you put your signature on 186 coils to the yellow dock receipt and when you signed as ship clerk this clerk's hatch report that has been marked Plaintiff's No. 9 and said that there was 186 coils, you thought there was 186 coils, and you tried to do the best job you could, didn't you? A. That's right.

Q. And if there had been any shortage that you

(Testimony of John Schearn.)

noticed, [173] you would have told someone about it, wouldn't you?

A. Yes; if you actually know there is a shortage, you are supposed to report it.

Mr. Roos: Thank you very much, sir.

Incidentally, your Honor, before I forget it, would you instruct the witness, if he is served with a subpoena by my process server this afternoon, he needn't appear?

The Court: You don't have to come back.

Mr. Roos: Even if you get a subpoena, you don't have to come back.

Q. Incidentally, Mr. Schearn, you never talked to me or saw me until right here in court this morning? A. That's right.

Q. And you have never been contacted by anybody representing Mr. Teague, the defendant in this case? A. No, I haven't.

Mr. Roos: Thank you.

Redirect Examination

By Mr. Petrie:

Q. Mr. Schearn, can you recall, other than the occasion on which you loaded these coils of copper wire that you have testified about, can you recall that you loaded at any other time in 1957 coils of copper wire?

A. I am not sure, but I can't recollect any. I am not positive. [174]

Mr. Petrie: The Government offers its Exhibit

9 in evidence, your Honor. That is the clerk's hatch report.

Mr. Roos: No objection.

Mr. Petrie: I will dismantle it from the rest of the papers.

(Whereupon Plaintiff's Exhibit 9 for identification was received in evidence.)

Mr. Petrie: Thank you, Mr. Schearn.

Mr. Roos: Thank you, Mr. Schearn.

(Witness excused.)

Mr. Petrie: Mr. Barthol, please.

ROBERT G. BARTHOL

recalled as a witness by the plaintiff, being previously sworn, resumed the stand and testified further as follows:

The Clerk: You have been sworn, Mr. Barthol.

The Witness: Yes, sir.

The Clerk: Please resume the stand.

Direct Examination

By Mr. Petrie:

Q. You told us, Mr. Barthol, that you participated in the investigation of this case, did you not?

A. I did.

Q. Did there come a time during that investigation when you interviewed the defendant, Mr. Teague? [175] A. Yes, sir.

Q. When was that?

(Testimony of Robert G. Barthol.)

A. The first time I interviewed him was on March 11, 1957.

Q. Where?

A. In the office of Inspector Middleton at the Richmond Police Department.

Q. Was Inspector Middleton present during the interview? A. Yes, he was.

Q. Was anyone else present?

A. Yes, Special Agent Cocker of the F.B.I

Q. What is that name?

A. Cocker—C-o-c-k-e-r.

Q. Anyone else present? A. No, sir.

Q. What time of the day?

A. I believe it was in the morning; I would say about 9:30 or thereabouts.

Q. Tell us as best you can recall what you said and what Mr. Teague said on that occasion.

Mr. Roos: May I interject, your Honor please? I would like to ask the witness one question more or less on voir dire before he is permitted to answer this question.

The Court: Go ahead.

Q. (By Mr. Roos): In this conversation with Mr. Teague and in all subsequent conversations that you may have had with [176] Mr. Teague, Mr. Barthol, Mr. Teague at all times emphatically denied his guilt of this charge, did he not?

The Court: Counsel, that is not voir dire; that is cross-examination.

Mr. Roos: Your Honor, if the defendant denied

(Testimony of Robert G. Barthol.)

his guilt, there is nothing before the Court and it is hearsay. That testimony should not go in.

The Court: Strike out the question and answer. It is not proper. Voir dire is a question of foundation.

Mr. Roos: I submit, your Honor, it is proper. The defendant is going to testify. The conversation is hearsay unless there is an admission of guilt.

The Court: You can't make him your witness in advance. If you want to, you can, but absent that, he is a witness on behalf of the Government.

Mr. Roos: Yes, but the question is objectionable unless there is going to be an admission of guilt.

The Court: I will ask the jury to disregard the statement of counsel. He can cross-examine the witness after he is examined on direct.

Mr. Roos: Then I am going to object to the question, if your Honor please, that was asked of Mr. Barthol concerning conversations on the ground that it calls for hearsay. Unless there is an admission of guilt, it is not admissible in any manner whatsoever. [177]

The Court: Any statement made by the witness —we are not talking about confessions—any statement made by the defendant to the witness is admissible in evidence.

Mr. Roos: That is not the law, your Honor.

The Court: I will overrule the objection.

Q. (By Mr. Petrie): What was the conversation on that occasion, Mr. Barthol?

A. The conversation—I asked the defendant

(Testimony of Robert G. Barthol.)

how he came by the wire that Mr. Middleton had told me had been located——

Q. Don't tell us what Mr. Middleton told you.

A. I asked him about the wire.

Q. What wire? Did you describe the wire?

A. Yes.

Q. Any more than by a reference to it as wire?

A. Yes, the wire which had been in his station wagon when Mr. Daniels had been talked to by Mr. Middleton. I asked him to tell me what the situation was on the obtaining of the wire, and he told me as follows: "On the 6th of March he went to work at Pier 50 in San Francisco at 8:00 in the morning and he worked until approximately 10:00 o'clock that night. He had parked his new 1957 Chevrolet station wagon in the parking area inside the terminal there. He got off work at 9:50—ten minutes to 10:00—that night and got in his car and drove out of the terminal. He went past the guard at the gate but the guard did not check his car; he merely waved him by. He then [178] proceeded across the Embarcadero to Third Street. He turned right or north on Third Street."

Q. Will you step over to the map and, with the pointer, indicate the route that the defendant told you that he took? Once you have oriented yourself, Mr. Barthol, if you can turn around and use the pointer with your left hand so that you don't obscure the diagram, it will be helpful.

A. Yes. Now, he did not mention this street and I am not familiar with the streets——

(Testimony of Robert G. Barthol.)

A. Just tell us what the defendant told you and locate the positions on the diagram.

A. He came out past the guard house and the guard, as I say, did not check him past but waved him by. And he said he went straight across the Embarcadero to Third Street. He turned right on Third and crossed the Third Street bridge. He then took a right turn on Berry Street and proceeded down the Embarcadero. At this point as he entered the curve of the Embarcadero, he was in the right-hand or curb lane.

Q. You are telling us what the defendant told you on the occasion?

A. Yes, this is what he told me.

Q. Yes.

A. He was in the curb lane and started to make a left-hand turn into the Embarcadero. When he was part way into that curve, he noticed a coil of wire laying on the street in the [179] curb lane ahead of him, and he stopped before he ran over it, and he got out and picked up the wire and put it in the back of the station wagon. At the same time he noticed lying ahead of him in the street, also in the curb lane, four other coils of wire; they were spaced between 10 and 15 feet apart going around the curve continuing the way he had been going.

Q. Will you take this white pencil, Mr. Barthol, and mark with a "T-2" the location of the first coil of wire according to what the defendant told you on that occasion, the first coil of wire?

A. Yes, That would be as he entered the turn

(Testimony of Robert G. Barthol.)

here; it won't take on this diagram; it has got Scotch Tape on it. It would be right at this point here.

Q. Right over the Scotch Tape?

A. Yes. The others were located—I won't mark them, just——

Q. No, don't mark the rest of them. The remaining four were farther along the Embarcadero?

A. Were farther along on the turn as he continued the turn into the Embarcadero. They were in the curb lane and ten to fifteen feet apart, and at that time he picked the other four up and put them in the station wagon and then continued on home to Richmond.

Q. Did the defendant tell you whether or not anyone was riding with him in the car? [180]

A. The defendant said he was alone in the car and he was alone all the way to Richmond. He said he parked the station wagon on the street at home and, when he went to work the next day, he took his step-son's, Mr. Daniels', '49 Chevrolet to work and he left the Chevrolet with Mr. Daniels with instructions to have a heater put in the car. He just purchased the car and he wanted a heater put in the car.

Q. Did you ask the defendant whether or not he had any discussion with Mr. Daniels about the wire? A. Yes, sir, I did.

Q. What did he say?

A. He said that he told Mr. Daniels that the wire was in the car but definitely stated that he did

(Testimony of Robert G. Barthol.)

not give him any instructions about the wire or to do anything with the wire; he merely said it was in the car.

Q. Did the defendant tell you how much ahead of the car the first coil of wire was at the time he stopped?

A. He said merely "he stopped short of it prior to running over it, because it was right in the middle of his lane."

Q. Did you interview the defendant on another occasion after that? A. Yes, sir, I did.

Q. When was that?

A. That was on March 29, 1957.

Q. Where did that interview take place? [181]

A. At the office—I forget the name of it—an office on Pier 50 in San Francisco.

Q. Who else was present besides yourself and the defendant?

A. Mr. Burroughs of the F.B.I.—B-u-r-r-o-u-g-h-s—and myself.

Q. Anyone else? A. No, sir.

Q. What was said on that occasion?

A. I asked Mr. Teague to go over the story again, and he repeated the identical story up until the trip down Berry Street. May I use the map again?

Q. Yes.

A. At this time he repeated the story that he crossed the bridge and took a right down Berry Street. He said that about half way down Berry Street, midway between Third and the Embarca-

(Testimony of Robert G. Barthol.)

dero, somewheres in this area (indicating) he first saw a coil of wire lying on the street. But this time he said he was unable to stop and he ran over the coil of wire and stopped beyond the wire. At that time he went back and picked up the coil of wire and put it in the station wagon. He then stated that he noticed——

Q. Pardon me. Will you mark with a "T-3" the location of that first coil of wire?

A. Well, about there (indicating).

Q. What about the remaining four coils? [182]

A. The remaining coils of wire he told me he noticed off the curb here and extending back. There were four coils in this position—well, it would be somewheres in like that (indicating). He said that they were not on the street; they were not in the curb lane but off to the right; in other words, somewhat back of that curve and back of where his route would take him around that curve.

Q. Did you point out to the defendant that he located the wire differently on the second occasion than he did on the first?

A. Yes, sir, I did.

Q. And what did he say? Did he have any explanation?

A. No, he said he must have gotten confused.

Q. The first time, is that correct?

A. He didn't say; he said he must have gotten confused.

Q. Did you make notes of those two interviews?

A. Yes, sir, I did.

(Testimony of Robert G. Barthol.)

Q. Do you have those with you?

A. Yes, sir, I do.

Mr. Petrie: I have nothing further.

Cross-Examination

By Mr. Roos:

Q. At each and every interview that you had with the defendant, Mr. Barthol, the defendant denied stealing this wire, did he not?

A. Yes. [183]

Q. And at each and every interview you had with him, he told you he found the wire some time after 10:00 o'clock at night on Berry Street, somewheres between Third Street and the Embarcadero, right? A. Yes, sir.

Q. And he told you the same thing when you searched his home in Richmond, did he not?

A. I didn't discuss that with him at that time.

Q. But you did search his home in Richmond?

A. Yes, sir.

Q. And he permitted you to search it without requiring you to get a search warrant or any other procedure?

A. He gave us a written permission to search, yes, sir.

Q. You were called into the case by Mr. Middleton of the Richmond Police Department, were you not, Mr. Barthol?

Mr. Petrie: Object to that as irrelevant, your Honor.

The Court: Sustained.

Mr. Roos: Pardon me, your Honor. May I review my notes just for a moment?

I have no further questions.

Mr. Petrie: Thank you.

Your Honor, may this witness be excused? He has duties apart from this case in Sacramento.

The Court: All right; you may be excused. [184]

Mr. Roos: Mr. Burroughs will be available?

Mr. Petrie: Yes.

I think I may have just one more witness, your Honor. Will you take a recess?

The Court: We will take the morning recess now, members of the jury.

(Recess.)

Mr. Petrie: Mr. Schneider.

ROBERT H. SCHNEIDER

called as a witness by the Government, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Robert H. Schneider.

Direct Examination

By Mr. Petrie:

Q. What is your occupation, Mr. Schneider?

A. State Harbor Police Officer.

Q. Where do you work?

A. Well, along the Embarcadero; office in the Ferry Building.

(Testimony of Robert H. Schneider.)

Q. Did you work there in March of 1957?

A. Yes, sir.

Q. Were you on duty on March 6, 1957?

A. Yes, sir. [185]

Q. Have you refreshed your recollection that you were on duty on that date? A. Yes, sir.

Q. From some document? A. Yes.

Q. What paper have you used to refresh your recollection?

A. We have a work sheet we fill out every night.

Q. Do you have that sheet with you?

A. Yes, sir.

Q. What are your duties generally while you are on duty?

A. Well, traffic work and general police work along the Embarcadero all the way out Third Street.

Q. Do you walk or do you ride?

A. No, ride.

Q. Please turn your attention to this diagram on the board. Can you locate Berry Street on it in the upper right-hand corner? And can you generally orient yourself? Step over to it. A. Right.

Q. Do you find Berry Street? Will you point it out to us?

A. (The witness indicated.)

Q. When you make your rounds during the course of the evening, what route do you travel?

A. We come down on the Embarcadero turn down Berry Street and continue on down Third Street to Arthur Avenue, which is the end of our beat. [186]

(Testimony of Robert H. Schneider.)

Q. And then do you return?

A. Then we return.

Q. To what point?

A. Then we just return back down Berry to the Embarcadero and down the Embarcadero to the Aquatic Park, which is the other end.

Q. What are you looking for when you make those rounds?

A. General police work; it is hard to say—anything of the kind a police officer would be looking for.

Q. How many times during the course of an evening of duty do you make that trip and return?

A. Oh, from four to seven, depending on what else we have to do.

Q. Do you always make the first trip at a particular time?

A. The first time is always after we get off traffic, between 5:30 and a quarter after 6:00.

Q. What time do you go off duty?

A. At midnight.

Q. Those were your hours on March 6, 1957?

A. Yes.

Q. Would you say you made between four and seven trips—— A. Yes, sir.

Q. ——on that night? A. Yes, sir.

Q. On that occasion did you notice anything lying in the [187] street, in Berry Street or along the Embarcadero? A. No, sir.

Q. Was someone riding with you?

(Testimony of Robert H. Schneider.)

A. Yes, sir.

Q. And can you tell us when during the evening you made those trips?

A. No, other than the first one, and we always make one before going in, which ends at about 11:30, but between that I can't say.

Q. Staggered, was it? A. Staggered.

Q. What is the name of the officer that was riding with you? A. Bryan Jackson.

Mr. Petrie: I have nothing further.

Cross-Examination

By Mr. Roos:

Q. Mr. Schneider, you say your route began at Aquatic Park on the north, and the southern end was where?

A. Arthur Avenue out near the slaughter houses.

Q. What is the approximate distance?

A. About seven and one-half miles.

Q. And the round trip, then, is about 15 miles?

A. Approximately; right.

Mr. Roos: I have no further questions. [188]

Mr. Petrie: That is all.

The Court: Thank you, Mr. Schneider.

(Witness excused.)

Mr. Petrie: The Government offers its Exhibits 2 and 3 in evidence. Exhibit 2 was the coils of wire and Exhibit 3 is the tag Mr. Calkins testified to.

The Court: You are offering 2 and 3 marked for identification in evidence?

Mr. Petrie: Yes, your Honor.

The Court: Any objection?

Mr. Roos: No, your Honor.

The Court: Admitted.

(Whereupon Plaintiff's Exhibits 2 and 3 for identification were received in evidence.)

Mr. Petrie: The Government rests.

The Court: Do you wish to go on now or make a motion?

Mr. Roos: I have a motion I would like to make to the Court.

The Court: Do you want me to excuse the jury?

Mr. Roos: Yes, I think it would be advisable.

The Court: I think maybe I will excuse the jury and let you come back a little bit earlier, come back at 1:30 instead of 2:00 o'clock. I have some legal matters I have to attend to with the lawyers in this case. Will the jury please [189] bear in mind the admonition I have given you and return at 1:30 p.m.?

(Thereupon the jury retired from the courtroom and the following proceedings were had in the absence of the jury:)

Mr. Roos: May it please the Court, at this time, on behalf of the defendant I move for a judgment of acquittal pursuant to Rule 29-A of the Federal Rules of Criminal Procedure.

The motion is made upon the ground that the evidence presented by the Government is insufficient for any reasonable person to make a finding that the defendant is guilty of the crime charged beyond

a reasonable doubt, which I understand is the basis to be considered by the Court under United States vs. Cole of this District, 90 Fed. Sup. 147, and other cases. And I say that looking at the evidence most favorably to the Government, no reasonable person could find beyond a reasonable doubt that the defendant was guilty of this crime.

The Government is bound to prove beyond a reasonable doubt under this Section of Title 18 and under the indictment that the property taken was part of an inter-state shipment; that the property was taken from a wharf; that it was taken with the intent permanently to deprive the true owner of possession, and that this act was committed by the defendant.

Leaving the defendant out of this for the minute, the evidence taken most favorable to the Government is insufficient [190] to establish beyond a reasonable doubt a corpus delicti, let along the guilt of the defendant. The evidence is insufficient to establish that this Plaintiff's Exhibit No. 2 was stolen from this shipment destined aboard the President Taylor from a wharf or from any other place, or that any part of the shipment consigned aboard the President Taylor was in fact ever stolen.

We have the evidence of 186 coils being delivered to the wharf and check in on the wharf by the dock checker, Mr. Delehanty, after it left the Federated Metals. We have the testimony this morning of Mr. Schearn—and I am grateful to the services of the F.B.I. for finding him, because they found him quicker than we could—testified that he counted

aboard and so certified on both the hatch records——

The Court: He didn't say that he counted——

Mr. Roos: And he said that if there was a shortage he would have mentioned it.

The Court: He said if something was obvious; but he directly testified that he didn't count it.

Mr. Roos: He said that the reason he couldn't make an accurate count, if you recall—he said the reason he couldn't make an accurate count was because the stuff was on top and the reason he couldn't make an accurate count was because a coil of a small diameter might have fallen down inside of a coil of wire of a larger diameter. So, therefore, it would appear that if any mistake would have been made, it would have [191] been a mistake in a short count and not a mistake in a high count. In other words, if there were in fact four coils of wire on a pallet and they were all of the same circumference, they would pile one on top of the other and he could easily count four, but if one of those coils was of small circumference and would have fallen into the center of the other three, then he would only count three whereas there were in fact four. Where a mistake in count was possible because of the palletizing of the cargo, it would have shown a short count and that would have turned up because he would have reported it; but no short count turned out even because of the difficulty of making an accurate count on the pallets.

Then, your Honor, carrying it one step further, we have a count made by Captain Johnson. And I was quite amazed at Captain Johnson's testimony,

but at any rate, he said he made a count in Yokohama and there was only 181 coils, and he denied that any other count had been made until he was shown the letter in his own handwriting addressed to Mr. Duncan Ward at American President Lines where he said, "I got to Kobe and ordered another count made and the third mate came up with 186 coils and he, in fact, found the five we missed in Yokohama behind some machinery consigned to Singapore." So we have 186 coils checked off the ship in Kobe and the boat note of the Japanese checkers in Kobe says 186 coils.

The Court: It also shows, does it not, [192] though, Mr. Roos, that apparently a lesser quantity in pounds arrived?

Mr. Roos: There is an uncertified weight of 22,000 pounds in San Francisco. There is the Japanese weight certificate and I don't know on what theory your Honor admitted it in evidence, but you admitted it.

The Court: On the same theory that I permitted it at the time that you wanted it. It is from the records of the American President Lines.

Mr. Roos: Anyway, it is in evidence, and it shows a shortage of 501 pounds—or, rather, not a shortage, but a differential in weight of 501—I have forgotten—or 499 pounds. I think it is 499. Do you have that weight certificate there?

The Court: Around 500.

Mr. Roos: 499 pounds over the weight in San Francisco. But even that doesn't jibe, because the only evidence on the weight is Plaintiff's Exhibit

No. 2 which so far was testified to by Mr. Barthol, who said he weighed this at the Richmond Police Station and it weighed 553 pounds.

Mr. Teige: 530.

Mr. Roos: My recollection is 553. I think the record will show that.

The Court: I am not going to decide this motion on 25 pounds of material.

Mr. Roos: So the weight is off somewhere. I stand [193] corrected. 531 pounds weighed in Richmond. So there is a difference there on just these five coils, which doesn't prove anything. It doesn't jibe with the difference in weight shown by the two weight certificates. So I say, your Honor—I am not saying if this were a civil case, I am not saying that there isn't something in the record whereby maybe somebody could find that it was stolen; but in passing on this motion which your Honor must determine in the first place, is there a corpus delicti proved beyond a reasonable doubt? And I don't think the evidence here is sufficient for any reasonable person——

The Court: Is there testimony that shows—evidence that shows that the defendant stole the wire?

Mr. Roos: I haven't got to that yet, your Honor. I say that there is no evidence upon which anyone could determine beyond a reasonable doubt that the theft of a portion of this shipment consigned aboard the President Taylor occurred by the defendant or any other person; that a corpus delicti has not been proven to the point where anyone can say beyond

a reasonable doubt, "Yes, a crime was committed; some of that shipment was taken."

As to the connection of the defendant with this crime, I say again that there is no evidence—no reasonable person could find beyond a reasonable doubt that the defendant stole this wire from the wharf, if in fact any wire was ever stolen from the wharf by any person. The evidence is purely [194] circumstantial and, as your Honor knows, circumstantial evidence must be consistent with the hypothesis of guilt and inconsistent with any reasonable hypothesis of innocence.

The defendant, according to the FBI, never made any admission of guilt. He always insisted on numerous occasions that he found the wire somewheres on Berry Street between Third Street and the Embarcadero, and the only inconsistency in his story that even the FBI was able to come up with was at one stage the location of the wire differed in some minor particular. But evidently the FBI never took Mr. Teague out to the area and had him actually pinpoint on the street where he found this wire, which would eliminate any inconsistency of estimating where something occurred on a dark night.

But there is no evidence of guilt in any statement he has stated. Certainly he had the opportunity to commit the crime, but so did several hundred other people—longshoremen, other members of the gang of which Mr. Teague was a member. Anybody could have committed it, if a crime was committed. The story is that he found it, and it is an entirely credi-

ble story. There is no admission of guilt whatsoever. How could any reasonable person hold beyond a reasonable doubt——

The Court: Isn't that a jury question, counsel?

Mr. Roos: No; it is a question of law for the purposes of this motion.

The Court: No; it is not a question of law. [195] I couldn't say that no reasonable person would accept as gospel truth the story told by the defendant as to how he found this wire with a tag on it and put it in his car——

Mr. Roos: Could any reasonable——

The Court: ——a tag on it, part of this shipment. Then he takes it to his home——

Mr. Roos: There was no concealment. The tag was still on it. There was no concealment. He left it in the car which he turned over to his son. He drove it right out the gate on that night.

The Court: Counsel, isn't that all a jury question we have in every case that involves circumstantial evidence?

Mr. Roos: For the purposes of this motion, your Honor, the——

The Court: If I were trying the case, yes, I can exercise the right to determine that I am convinced beyond a reasonable doubt; but that is not the question. When you demand a jury, you are entitled to a jury verdict. Both sides are entitled to a jury verdict once the defendant asks for a jury trial.

Mr. Roos: For the purpose of this motion, your Honor, the question of law for your Honor to pass on as stated by the cases is: Could any reasonable

person find beyond a reasonable doubt that the defendant is guilty of this crime?

The Court: Well, I would have to say in answer to [196] that question that there are at least twelve persons that could reasonably find on the evidence that the defendant is guilty. I wouldn't come to any other conclusion. How could I say that it is not reasonable on the evidence for a person to find the defendant guilty? There is the missing wire. It was found in his possession; the testimony that his car was parked there that night; that the wire was on the dock, and he has got it in his car. There is a tag on it. He takes it home. What is an innocent person doing picking up wire on the street, copper wire, and taking it home and then trying to sell it? All of those are inferences and conclusions that any reasonable person, taking all the circumstances together, might well find the defendant guilty. I am not saying what I would do if I were trying the case as a matter of judgment, but I certainly cannot say on the evidence here that a reasonable person hasn't got sufficient evidence if he wants to find that way.

Mr. Roos: I think in a civil case, yes, but not in a criminal case where a finding beyond a reasonable doubt is required.

The Court: All you are asking me to do is to do what is frequently asked by attorneys from a judge, is to take over the case and decide it myself whether I think he is guilty or not.

Mr. Roos: Well, that is exactly the purpose——

The Court: No; my function as a judge is only

to [197] determine whether there is sufficient evidence upon which a reasonable person could act in determining the guilt or innocence, not my determining whether he is guilty or innocent.

Mr. Roos: I think from the state of this record no reasonable person could find him guilty beyond a reasonable doubt, because no reasonable person could find in the first place that a crime was committed.

The Court: All I can say in answer to that is that if the jury should find the defendant guilty in this case, I wouldn't set aside the verdict. I might come to a different result myself, but I am not trying the defendant. And I might take a lot of other factors into account. I am not saying that I would. All I am telling you is that there is a jury of twelve people and there is certainly circumstantial evidence that would justify and support a verdict of guilty.

Mr. Roos: Is the circumstantial evidence inconsistent with any hypothesis of innocence?

The Court: I think so. I think there is enough evidence here, taken altogether, to indicate that this defendant took this wire off the dock; that all of the circumstances of what he did are consistent with stealing the wire and are produced here in evidence. I am not saying—don't misunderstand me—that that is my finding, but that those circumstances are sufficient to go to a jury.

Mr. Roos: Isn't it equally consistent that [198] he found the wire on the street and intended to sell

it rather than try to find the true owner, which may be illegal?

The Court: Pragmatically, yes, if you go on the hypothesis that a jury as well as a judge must accept as true a statement made by a witness.

Mr. Roos: Well, there is no evidence to the contrary.

The Court: Certainly there is evidence to the contrary. There is circumstantial evidence to the contrary, and there is also, if I may say so, the circumstance that this is a fantastic story that is told by the defendant.

Mr. Roos: What circumstantial evidence is there to the contrary?

The Court: It is completely unbelievable, in my opinion, but I don't know whether I would still find him guilty of the offense here.

Mr. Roos: What circumstantial evidence is there that he picked the property off the dock other than the opportunity?

The Court: I will argue the case with you, if you want me to.

Mr. Roos: Other than the opportunity.

The Court: But it is only carrying coals to Newcastle. What ordinarily decent person working at a pier where he sees boats being loaded would go up Berry Street and [199] stop for different pieces of heavy wire, each of them weighing 125 pounds apiece, stop and load them in his car, take them home, and then send his son-in-law out the next day to see how much he could get for that wire? Is

that a story that is believable on the part of a normal, law-abiding citizen?

Mr. Roos: It doesn't have to be——

The Court: I would say that I would be a moron if I had to follow your line of reasoning that I have to accept that statement.

Mr. Roos: My point is, your Honor, that there is no circumstantial evidence to show that this defendant took that wire off the wharf.

The Court: Well, there is circumstantial evidence there.

Mr. Roos: The only thing is that his car was there and he was working there.

The Court: All of the circumstances put together I think are sufficient to make out a circumstantial case. Whether or not it is strong enough to warrant a verdict of guilty is for the jury, whether they believe it sufficiently.

Mr. Roos: He had the opportunity to commit the crime along with a hundred other people.

The Court: And he had possession of the property.

Mr. Roos: Where is any evidence to show that he did in fact take it off the dock and not [200] find it?

The Court: Well, the fact that he has possession of the property under all of the circumstances is sufficient to warrant assumption that he took it off the dock.

Mr. Roos: That isn't the law, your Honor.

The Court: Well, I am not discussing the legal proposition with you. All I am saying is that it is

a matter of weight of evidence, Mr. Roos. It isn't the strongest case in the world. Nobody saw him take the stuff and put it in his car and take it home, and no one can read his mind as to what his intent was, but there is a great deal of evidence of a circumstantial nature which it is up to the jury to evaluate, in my opinion.

Mr. Roos: I will submit the matter.

The Court: I can't take the case away from the jury on this state of the record. Up until the time that certain of the evidence had come in, yes, it looked to me like there might be a case that would not go to the jury, but there is now evidence of a circumstantial nature that brings the defendant in direct contact with this thing. I think there is sufficient evidence to go to the jury, Mr. Roos.

Mr. Roos: Well, I will submit the motion, Judge. Thank you.

The Court: I will deny the motion for a judgment of acquittal.

(Discussion between Court and counsel as to further [201] time required for the trial of the case omitted from this transcript.)

(Thereupon a recess was taken until 1:30 o'clock p.m. this date.) [201-A]

Wednesday, September 17, 1958—1:30 o'Clock P.M.

Mr. Roos: May it please the Court, Mr. Petrie and I reached a stipulation concerning the newspaper American Metal Market that the witness Teller testified to yesterday. The March 5, 1957, ed-

tion gives the San Francisco price of No. 1 heavy copper at 23½ cents to 24 cents a pound; March 6th the San Francisco market does not appear in the paper, and March 7th edition, the San Francisco price for No. 1 heavy copper is the same as it was on the 5th, that is, 23½ to 24 cents a pound.

Mr. Petrie: So stipulated, your Honor.

Mr. Roos: Call Mr. Sheridan.

Mr. Petrie: As part of the last stipulation, your Honor, the prices shown are listed in the papers as dealer's buying prices.

JOHN J. SHERIDAN

called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: My name is John J. Sheridan.

Direct Examination

By Mr. Roos:

Q. Where do you live, Mr. Sheridan? [202]

A. 2910 Evan Avenue, Richmond, California.

Q. And your business or occupation?

A. I am a Richmond city councilman and vice president of the General Truck Drivers and Helpers Union 315, Contra Costa County.

Q. And how long have you lived in Richmond?

A. I have lived in Richmond since 1941.

Q. And before you held your present office as city councilman in Richmond did you hold any other office in the city of Richmond?

(Testimony of John J. Sheridan.)

A. Yes, I was mayor of Richmond for two years.

Q. What years was that?

A. '54-55 and '56-57.

Q. Do you know the defendant Teague?

A. I do.

Q. Edgar Harold Teague? A. Yes.

Q. And he lives in Richmond, does he?

A. He lived in Richmond. I think he lives in El Cerrito now.

Q. How long have you known Mr. Teague?

A. I have known Mr. Teague since 1951.

Q. Could you tell us just generally what the nature of your contacts have been with him and his family?

A. I have known him being a labor official and I have had [203] some acquaintance with him as a working man. Several years ago he contacted me and obtained summer emplyoment for his son, and then I know the family generally in the area, some of the incidents that have occurred with the family, I know them.

Q. Do you know Mr. Teague's general reputation for honesty and integrity in that locality?

A. I do.

Q. And what is that reputation?

A. Good.

Mr. Petrie: As of when, your Honor?

Mr. Roos: As of right now.

The Witness: Good, sir.

Q. (By Mr. Roos): And have you ever heard anything against him, other than of course with the

(Testimony of John J. Sheridan.)

exception of this charge on which he is on trial here? A. No, sir.

Mr. Roos: Thank you, sir.

Cross-Examination

By Mr. Petrie:

Q. Mr. Sheridan, what was your position, sir? I didn't get that. Not your governmental position.

A. Vice president.

Q. You said you were vice president of what?

A. General Truck Drivers and Helpers Union Local 315.

Q. Is that a local which is located in Richmond? [204]

A. Yes, sir, in Contra Costa County.

Q. How long have you held that position?

A. Since 1948.

Q. When did Mr. Teague and his family leave El Cerrito, do you know—not El Cerrito, but Richmond? When did they move to El Cerrito?

A. Oh, it has been I believe within the last two years.

Mr. Petrie: I have nothing further.

The Court: That is all.

Mr. Roos: How far is El Cerrito from Richmond?

The Witness: It is adjacent right to Richmond, sir.

Mr. Roos: Thank you.

Agent Burroughs.

FRANKLIN S. BURROUGHS

called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Franklin S. Burroughs.

Direct Examination

By Mr. Roos:

Q. Your occupation is Special Agent of the Federal Bureau of Investigation? A. Yes. [205]

Q. You have been active in the investigation of this case? A. Yes, I have.

Q. And did you last Friday accompany these five coils of copper wire in a truck to a public weighmaster here in San Francisco?

A. Yes, I did.

Q. And were they weighed at that time by that public weighmaster?

A. The truck was weighed with the coils in them.

Q. And then the truck was weighed with the coils not in them, correct? A. I don't know.

Q. You were present, weren't you?

A. I was not present when the truck was weighed without the coils.

Q. Where were you?

A. Well, the truck apparently was weighed without the coils before I was present.

Q. In any event, you went down and accompanied these coils to the public weighmaster from the U.S. Marshal's office and you rode back and ac-

(Testimony of Franklin S. Burroughs.)

companied them back to the U.S. Marshal's office; is that right? A. That is correct.

Q. And that was in accordance with instructions received from Mr. Petrie? [206]

A. That is correct.

Q. Pursuant to—well, you wouldn't know about that. And the public weighmaster gave you a certificate of weight and measurement, did he, for this, Plaintiff's Exhibit 2? A. Not to me.

Q. Who did he give it to?

A. He gave it to the truck driver.

Q. And do you have that certificate?

A. I have a copy of it.

Q. May we have the copy?

A. I haven't got it with me.

Q. Would you produce it for us?

A. Yes.

Mr. Roos: Unless Mr. Petrie is willing to stipulate.

Mr. Petrie: No, I am not. I am going to object to its introduction through this witness, your Honor. We can have the man who did the weighing here and made the computation, and I won't object to it.

The Court: You say you have the man?

Mr. Petrie: No, no, this weighing was done at the request of defense counsel, your Honor, and I just sent Mr. Burroughs along.

Q. (By Mr. Roos): No representative of the defendant was present, was there? [207]

A. Would you repeat that question, please?

(Testimony of Franklin S. Burroughs.)

Q. No representative of the defendant went with you on this journey to the weighmaster and back?

A. Just the truck driver.

Q. I wasn't there? A. No.

Q. And the truck driver was hired from Lyons Van & Storage? A. Yes.

Q. Did you get a copy of the weight certificate from the truck driver? A. Yes, I did.

Mr. Roos: May I see it, please?

(Document handed to counsel.)

Mr. Roos: May we have that marked for identification?

The Clerk: Defendant's Exhibit L marked for identification.

(Copy of weight certificate was marked Defendant's Exhibit L for identification.)

Q. (By Mr. Roos): You made no question or you didn't question the manner in which the weighing was carried on, did you? A. No.

Q. And you didn't protest that you hadn't seen the truck weighed? [208]

A. No; I merely went along with the instruction of the United States Attorney to stay with the evidence.

Q. Then you were with the evidence at all times?

A. Yes, I was.

Q. While it was being weighed on the truck?

A. Yes, that's correct.

Q. And this is the receipt from you? It is a duplicate original; I see it has a seal on it.

(Testimony of Franklin S. Burroughs.)

A. That is a copy.

Q. It also has the seal of the weighmaster, has it not? A. Yes.

Mr. Roos: We will offer that in evidence.

Mr. Petrie: Object to that as without foundation. We don't know how this weight was obtained. Mr. Burroughs said only he noticed the truck and the coils were weighed together; he doesn't know how the weight was arrived at; he didn't participate in the weighing. I think we are entitled to have the certificate introduced through the weighmaster.

The Court: I suppose "tare" means the——

Mr. Roos: Gross, tare and net.

The Court: The weight of the truck?

Mr. Roos: Yes.

The Court: What is all this fuss about? Was there a few pounds—this certificate, the weighmaster's certificate, shows 460 pounds and some place else it was 530 [209] pounds. Is there any particular significance to this?

Mr. Roos: Yes, your Honor, there is. I wouldn't offer it if it weren't.

The Court: Are public weighmasters' certificates admissible in evidence?

Mr. Petrie: Not being——

Mr. Roos: I believe they are, your Honor, under the California Business and Professions Code.

The Court: I don't know. Maybe they are. Are they public records that may be introduced without authentication?

(Testimony of Franklin S. Burroughs.)

Mr. Roos: I wouldn't want to say to the Court positively.

The Court: That is the only question. If you are going to spend a long time about 30 or 40 pounds, whether it is 460 or 500 pounds, why, I wouldn't know. If I should admit this weighmaster's certificate, I will admit it.

Mr. Roos: I don't understand the dispute, your Honor, when Mr. Burroughs goes along with it, gets it weighed and brings it back, and then they won't stipulate to it.

The Court: I can understand it. There is no use saddling this man with it. All he did was go along. The United States Attorney said, "You stick with the evidence," and then he went along and they weighed something. He is not a competent witness to testify how much this weighed; he didn't weigh it. But if the weighmaster's certificate is a public record and it [210] is admissible in evidence, I will admit it. Have you got any authority to show that that is so? I have never had that qquestion. If not, you would have to have the man who did the weighing to testify to it in court.

Mr. Roos: I hoped that it would be stipulated to, that the weighmaster weighed it and found that weight on that date. It is entitled to as much weight as any other weight, but if——

Mr. Petrie: Mr. Roos has known since yesterday at the outset of the case that there wasn't going to be any stipulation.

Mr. Roos: I didn't. I understood that you

(Testimony of Franklin S. Burroughs.)

wouldn't stipulate that this certificate was correct as against the other weight.

The Court: Gentlemen, is there a California statute that makes these public weighmaster certificates admissible as such in evidence? Is there? I don't know.

Mr. Roos: I wouldn't—your Honor, when I make a statement to the Court that the law is such-and-such I like to be sure. I believe there is, but I am not certain.

The Court: Is there anything else that you wanted of this witness?

Mr. Roos: No, your Honor.

The Court: Suppose you withdraw him and let me know. If this is admissible as such, I will admit it. While [211] you are doing something else your associate can look up the California law provisions and let us know in five minutes. That is very simple.

Mr. Roos: That is all.

Mr. Petrie: Thank you, sir.

Mr. Roos: Call Mr. Hellman.

I did have just one more question of Mr. Burroughs on another subject, if I might ask him.

The Court: All right; come back.

Q. (By Mr. Roos): Mr. Burroughs, you were present when your colleague, Agent Barthol, testified? A. Yes, I was.

Q. And you heard him testify concerning Mr. Teague's statement about where he found the wire?

A. Yes.

Q. Now, neither you nor Mr. Barthol ever took

(Testimony of Franklin S. Burroughs.)

Mr. Teague physically to the block on Berry Street between Third and Embarcadero and had him actually point out on the ground where he found the wire did you? A. No.

Mr. Roos: Thank you.

Cross-Examination

By Mr. Petrie:

Q. Did you get during any interview that you and Mr. Barthol had with Mr. Teague a diagram from Mr. Teague? [212] A. Yes.

Q. Do you have that? A. Yes, I do.

Q. With you now? A. Yes.

Q. Was that taken during the second interview? Was that the one in which you were present?

A. That is correct, sir.

Mr. Petrie: May this be marked Government's Exhibit 10 for identification.

The Clerk: Plaintiff's Exhibit 10 for identification.

(The diagram was marked Plaintiff's Exhibit No. 10 for identification.)

Mr. Petrie: Defense counsel has been furnished a copy.

Mr. Roos: I object to this; it is improper cross-examination.

Mr. Petrie: He did ask him whether or not the man was taken out to the area.

The Court: You opened up the subject; it is a proper line of inquiry.

(Testimony of Franklin S. Burroughs.)

Mr. Roos: I have no objection if he wants to put the document in evidence.

Mr. Petrie: We will offer it in evidence, [213] then.

The Clerk: Plaintiff's Exhibit 10 admitted in evidence.

(Whereupon Plaintiff's Exhibit 10 for identification was received in evidence.)

Q. (By Mr. Petrie): What is Plaintiff's Exhibit 10, Mr. Burroughs?

A. This is a diagram of Berry Street between Embarcadero and Third Street and it has on it an "X" made by Mr. Teague as to where the first coil of wire was found and four more marks as to where the other four coils were found.

Q. Did Mr. Teague or did you or Mr. Barthol draw the rest of the diagram?

A. Barthol drew the rest of the diagram; Mr. Teague put the "X" on it.

Q. Was the rest of the diagram complete before the "X" was placed upon it by Mr. Teague?

A. Yes.

Mr. Petrie: That is all I have, your Honor.

Q. (By Mr. Roos): The diagram does not purport to be to scale, does it, Mr. Burroughs?

A. No.

Q. Just a rough, free-hand sketch by you or Mr. Barthol? A. It is a sketch.

Mr. Roos: That is all.

The Court: That's all. [214]

Mr. Petrie: Thank you.

FRANCIS W. HELLMAN

called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and the jury.

The Witness: My name is Francis W. Hellman.

Direct Examination

By Mr. Roos:

Q. Where do you live, Mr. Hellman?

A. 1256 Capuchino Avenue, Burlingame.

Q. And your business or occupation is what?

A. I work for American President Lines in the finance department, controller's division, dock paymaster's office, and my title is junior auditor.

Q. And in response to a subpoena that was served upon you have you produced here yesterday an envelope containing certain payroll records of American President Lines that have been marked Defendant's Exhibit B for identification?

A. Yes, I did.

Q. I wonder if you would open that up and, referring to your records, would you tell me first the total amount of wages paid by American President Lines to Edgar Teague in whatever the first year you have there is? Is it 1955?

A. 1955 is correct. The total is not listed here for 1955. [215]

Q. Is it totaled up to any particular part of 1955?

A. Yes, it is up to the point, $3,760.09.

(Testimony of Francis W. Hellman.)

Q. And through what date is that?

A. June 24, 1955.

Q. I won't ask you to add the rest of those figures. Now, what was the total amount paid Mr. Teague in 1956? Incidentally, are those figures gross pay or take-home pay?

A. These are gross.

Q. 1956.

A. O.K. One second. For 1956 the total earnings shown are $8,541.03.

Q. And 1957?

A. For the year 1957 the earnings shown are $10,215.19.

Q. An 1958 up to the last date you have there?

Mr. Petrie: I think that is irrelevant, your Honor. I think 1958 does not concern us.

The Court: Yes, it would be beyond the period.

Mr. Roos: Thank you very much, Mr. Hellman. I have no questions.

Cross-Examination

By Mr. Petrie:

Q. Mr. Hellman, can you tell what part of the ten thousand odd dollars paid Mr. Teague in 1957 was for overtime work and what part was for regular work?

A. Well, to find that out I would have to add the total [216] overtime on these cards.

Q. Is it a computation you can make readily? How long would that take you?

A. I would need an adding machine.

(Testimony of Francis W. Hellman.)

Mr. Petrie: Perhaps the witness can be excused, your Honor, and return with that computation, so we don't waste time.

The Court: Is it important?

Mr. Petrie: I won't press it.

The Court: Was there much overtime?

The Witness: This type of worker earns considerable overtime.

The Court: In other words, what is the daily rate, do you know?

I am just asking these questions to ascertain the materiality of it.

The Witness: The hourly rate for this gentleman is $3.31 per hour straight time; $4.96½ per hour overtime.

The Court: So you would have about $25.00 a day for straight time pay ordinarily five days a week?

The Witness: Well, straight time pay for eight hours is $26.48, and for overtime for eight hours is $39.72. These are the current rates of pay for 1958.

The Court: At least on the $10,000 basis it would amount to at least two or three thousand dollars overtime? [217]

The Witness: I would estimate 20% of the $10,000 was overtime.

The Court: 20%; that would be about two thousand?

The Witness: Yes.

The Court: Well, is that close enough?

Mr. Petrie: Certainly, your Honor.

The Court: Anything else from the witness?

Mr. Roos: No, your Honor.

The Court: That is all. May he take these records back with him?

Mr. Roos: As far as I am concerned, your Honor.

The Witness: Take them back to my office?

The Court: Yes.

The Witness: O.K. Thank you.

ERNEST C. REID

called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Ernest C. Reid.

Direct Examination

By Mr. Roos:

Q. Where do you live, Mr. Reid?

A. 146 Los Banos, Daly City, California.

Q. And what is your business or occupation? [218]

A. Hull painter for American President Lines.

The Court: A what?

The Witness: Hull painter.

Q. (By Mr. Roos): And how long have you been on that particular job?

A. Let's see; it will be seven years in November this year.

(Testimony of Ernest C. Reid.)

Q. And are you a member of the same crew that Edgar Teague is a member of down there?

A. I am.

Q. Pardon me? A. I am.

Q. And how long have you known Mr. Teague?

A. Say around about nine or ten years.

Q. How many members are there in this crew of hull painters with the American President Lines?

A. There are seven steady painters for American President Lines in our department.

Q. Seven members in your department. Are there any other members on the——

A. Yes, there is sixteen other fellows working in the maintenance department.

Q. Are they also regular employees of American President Lines? A. Yes, sir.

Q. Now, you are familiar, are you, with the area of the [219] American President Lines pier in the parking area? A. Yes, sir.

Q. I show you this picture Defendant's Exhibit G and ask you could you identify that for us.

A. Yes. This is the parking lot and the valley down there in Mission Rock.

Q. Portion of the parking lot? A. Yes.

Mr. Roos: We will offer that in evidence, your Honor. It is only marked for identification.

Mr. Petrie: Object to it. That is the one Mr. Sledge said was not an accurate representation. It certainly has not been established through this witness.

(Testimony of Ernest C. Reid.)

Mr. Roos: Captain Sledge couldn't identify it, but this witness could, your Honor.

The Court: He says it is a portion of the parking lot.

Mr. Roos: Yes.

The Court: Is that sufficient identification?

Mr. Roos: I think so.

The Court: What are you going to argue from the picture?

Mr. Roos: I just want to show the general area, your Honor.

The Court: Well, it is only part of the general [220] area.

The Witness: All but three cars——

The Court: Did you take the picture?

A. No, I did not. No, I park over there every day, though.

Q. How much of the parking area is shown in that picture, of the total area? Can you tell from looking at it?

A. Well, where they specify right now is the parking area, I believe it is all in there now.

Q. You say this shows completely the entire parking area?

A. The entire parking area for employees of American President Lines working inside the terminal.

Q. The parking area for the employees?

A. Yes, sir.

Mr. Petrie: May I examine the witness on this, your Honor, before making an objection?

(Testimony of Ernest C. Reid.)

The Court: Yes.

Mr. Petrie: Mr. Reid——

A. Yes, sir.

Q. Would you have a look at the diagram that we have here on the board? A. Yes.

Q. You will notice it is a diagram of Pier 50 in the bottoom left-hand corner, and at the bottom of the pier is a building labeled "Utility Building."

A. Yes. [221]

Q. Have you oriented yourself on that?

A. Yes.

Q. Does this picture, Defendant's Exhibit G for identification, show any part of the area immediately in front of the utility building?

A. We are not allowed to park there.

Q. You are not now, but you were——

A. Never was.

Q. Well, will you answer my question: Does the picture show any portion of that area?

A. It doesn't show in front of the utility building, no, sir.

Mr. Petrie: I will object to it, your Honor, as being incomplete.

Mr. Roos: It is not supposed to. It is supposed to show the parking area. You can't show the whole area in one picture, your Honor. Why don't you ask him to show us there on the diagram the area of the picture?

The Court: What is the good of the picture, then, if it doesn't show it? You have got it on the board.

(Testimony of Ernest C. Reid.)

Q. (By Mr. Roos): You never saw the picture before just now, did you?

A. No, I did not.

Q. Could you show us, referring to the diagram, the area shown on the picture? Do you think you can do that? [222]

A. I think right now the parking area starts from here up to here.

Q. Show us the area covered by the picture.

A. I think the——

Q. Can you identify the shed over here?

A. I believe this is A up here, C over here, and D over here. Pier A, B, C, D. Pier C is right in here.

Q. What shed is the one on the right?

A. This is Pier C—50-C.

Q. Would you write on the picture, then, put a little arrow leading to it, what that shed is there?

(The witness writes on diagram.)

Q. How about this building down here in the corner?

(The witness writes on diagram.)

A. You want the other one, too?

Q. And the other one too, yes.

(The witness writes on diagram.)

Q. Now, then, the one in the center, what is that pier? A. That is B.

(Testimony of Ernest C. Reid.)

Q. Pier 50-B? Would you say that was Pier 50-B before you marked the picture?

A. Oh, wait a minute; that is A, yes—B ahead of D.

Q. In other words, am I correct in saying that this picture shows the parking area generally in here; that is taken facing down this way? [223]

A. Yes, sir.

Mr. Roos: We will offer it in evidence, your Honor.

Mr. Petrie: The picture we submit is incomplete. The picture was apparently taken from the general area where the coils were stored according to the testimony and where the defendant's car was parked. The picture itself doesn't include that area.

Mr. Roos: Have you got a picture that does?

Mr. Petrie: I don't.

Mr. Roos: The picture is only supposed to be a representation of the area it is supposed to show. I don't know how you could put the entire area in one picture, your Honor, so it goes in all four directions.

The Court: I am not urging or suggesting that you leave anything out, counsel, but what purpose does this serve? If it doesn't show all of the area in this part of it—there has been no testimony directed towards anything happening in this particular area. You might as well take a picture of Market Street and put it in.

Mr. Roos: It isn't important enough. If Mr. Petrie doesn't want it in, I will withdraw the offer.

(Testimony of Ernest C. Reid.)

It isn't important enough to have a hassle about it.

The Court: It isn't what Mr. Petrie wants. I am just suggesting so the jury will not be confused that there is [224] no purpose in this picture unless you have a picture of the entire area. If you want it to go in, I will let the picture go in for the limited purpose of showing the area but does not include the entire area.

Mr. Roos: That is the only purpose it was offered for, Judge.

The Court: All right; mark it in evidence. Then you can't complain about it.

The Clerk: Defendant's Exhibit G admitted into evidence as limited by the Court.

(Photograph of American President Lines parking lot marked Defendant's Exhibit G for identification admitted into evidence.)

Q. (By Mr. Roos): Are you still employed by APL? A. I am.

Q. Mr. Teague also? A. He is.

Q. Both of you doing the same job that you did during March of 1957? A. Yes, sir.

Q. Getting back to the evening of March 6, 1957, did you see Mr. Teague that day and evening?

A. Yes, we work together every day unless somebody is sick.

Q. And did you see Mr. Teague's car that evening? A. I did. [225]

Q. Was there anything about the car that stands out in your mind?

(Testimony of Ernest C. Reid.)

A. Yes. He had a new car then.

Q. Was that the first time you saw it?

A. Yes.

Q. What time did you quit work that night?

A. It is pretty hard for me to tell you the exact time, we work so many nights; I guess it was around about quarter to ten or ten o'clock, or after ten.

Q. And what did you do immediately after you stopped work?

A. Well, we went and changed clothes, and Mr. Teague, I wanted to see his new car. I jumped in it and started the power, a 1957 Chevrolet, and looked the car over and I was very much impressed with the new car, so——

Q. Did you drive the car around any place?

A. I did drive it around the parking lot there.

Q. Could you show us on the diagram up here on the board, use this pencil to point out, show us where you drove it around?

A. This area here looks small on the picture, but it is a wide area down there on the pier, so we drove around here. There was hardly any cars around so we drove it around in this area. I mean I drove and Teague was sitting alongside of me.

Q. You drove it around and Mr. Teague was sitting alongside of you? A. Yes. [226]

Q. Incidentally, before you sit down, do you remember where the car was parked that night when you started driving it around?

A. In the parking lot.

(Testimony of Ernest C. Reid.)

Q. Could you show us about where, as near as you can remember it, and put an "X" there?

A. Somewhere around there.

Q. Near the center of the parking area?

A. Yes, sir.

Q. Is this about it?

A. That is where I started from.

Mr. Roos: Let me put a little circle around it. I will mark it R-1.

Mr. Petrie: R-1, Mr. Roos?

Mr. Roos: R-1 where Mr. Teague's car was when Mr. Reid got in it.

Q. And how long did you spend driving his new car around the parking area, would you say?

A. I would say three or four minutes, five minutes, ten minutes.

Q. And what did you do after that?

A. I looked the car over and tried the power out in that little dock over there and looked it over good, and then he sildes over in his car and I jumped in mine—parked alongside of my pickup truck, and then I jumped in there, my car, and he [227] proceeded ahead of me, and I followed him out of the gate.

Q. In other words, you got out of his car and got in your own pickup truck? A. Yes.

Q. You saw his car all the time from then on as it went out the gate? A. Yes.

Q. And you followed him out the gate in your pickup truck? A. Yes.

(Testimony of Ernest C. Reid.)

Q. How far behind him were you as you went down this area out past the guardhouse?

A. Well, I couldn't be over a hundred feet.

Q. What did Mr. Teague's car do when it got to the guardhouse?

A. I believe he slowed down. I don't remember whether he stopped, but I believe he either stopped or slowed down in the gate there and I followed him out. I stopped. The guys waved us out, so I proceeded home.

Q. And did you see which way Mr. Teague's car went as it came out the gate?

A. Yes, I believe he went up to Fourth Street. Right outside of the gate is Third Street. He turned right and I turned left.

Q. He turned right on Third and you turned left? A. I turned left on Third. [228]

Q. Can you show us—do you want to look at this diagram? A. Here is the gate here.

The Court: Well, he has already testified that he turned right and the other fellow turned left. That is clear enough. We understand what right and left is.

Q. (By Mr. Roos): When you were driving Mr. Teague's car around there for a few minutes did you look it over pretty carefully?

A. When I parked the car, yes, I did.

Q. Inside and out? A. Inside and out.

Q. How many seats did it have?

A. He only had the front seat up. The back

(Testimony of Ernest C. Reid.)

seat was down. I saw the back was nice, plenty of room for a mattress to sleep in.

Q. Were you thinking about buying a new car yourself about that time?

A. Yes, I did. Come to think about it, three months later I bought a Chevrolet.

Q. And was there anything in the back of Mr. Teague's Chevrolet station wagon that night?

A. No, there was not.

Q. Calling your attention specifically to these coils of copper wire out here that are marked Plaintiff's Exhibit 2, were those coils of copper wire in the station wagon? [229]

A. Not that night.

Q. Did you ever see those coils of copper wire before today?

A. Not these particular ones, no.

Q. And you say this was around ten o'clock that night?

A. I am just assuming now; I ate—I don't know what the actual time was.

Q. I know; it is a year and a half ago, I understand that.

A. It was around that time, I guess.

Q. And if this wire had been in the station wagon did you inspect it carefully enough so you would have seen it?

Mr. Petrie: Object to that as calling for a conclusion of the witness.

The Court: Sustained. You are just laboring it now.

(Testimony of Ernest C. Reid.)

Q. (By Mr. Roos): Was the wire in the station wagon? A. No, it was not.

Mr. Roos: You may cross-examine.

Cross-Examination

By Mr. Petrie:

Q. How long had you known Mr. Teague, Mr. Reid?

A. As I stated before, nine or ten years.

Q. Where did you first meet him?

A. We seamen meet all together.

Q. I beg your pardon? [230]

A. I met him in the union hall.

Q. In San Francisco or somewhere else?

A. No, in San Francisco.

Q. Now, you say about nine or ten years ago?

A. Yes.

Q. How long have you been with the American President Lines?

A. I say seven years in November.

Q. You said seven years in November?

A. Yes.

Q. Did you and Mr. Teague go to work for the American President Lines Company at the same time? A. No, he was a year ahead of me.

Q. A year ahead of you. During the time that you have been there have you been working continually in that paint group or paint gang?

A. Yes, sir, except vacation times.

Q. Except when you haven't been working at all? A. Yes.

(Testimony of Ernest C. Reid.)

Q. And during that period Mr. Teague has been the leader of that gang, has he?

A. Well, he is second in command, I should say.

Q. Who is the first?

A. There is another fellow, Alex Wharton; he is the boatswain; Teague is the leaderman.

Q. Mr. Teague is the painter leaderman? [231]

A. Yes, sir.

Q. You take your orders directly from Mr. Teague? A. Yes.

Q. How do you fix the date, Mr. Reid, of March 6th as being the night when you first saw Mr. Teague's car—Mr. Teague's station wagon?

A. Well, that's the first time I seen his car.

Q. How are you able to say that it was on March 6th that you first saw his car, March 6th, 1957? I believe that is the date you gave to Mr. Roos.

A. Well, I believe that is the day we worked that night; I have forgotten what shift, but we worked—that is the first date he brought his car down, I believe, and that is the time I went in there to take a look at his car.

Q. Do you know now that it was on March 6, 1957, that you first saw the station wagon?

A. Well, through—I believe Teague bought his car on the 5th or the 4th, I am not quite sure, but that is the first time I had to inspect his car, the first chance to look at it.

Q. How do you know that Mr. Teague bought the car on the 4th or the 5th? Is that what he told you?

(Testimony of Ernest C. Reid.)

A. No; but at least we work together; we know what is going on.

Q. I know, but this is a year and a half ago. What I am trying to get at is this: How are you able to say now that it [232] was March the 6th, 1957, that you——

A. I get what you mean. I would say about four or five days later or six days later—I have forgotten now—Teague came over and told me that they are trying to pin something on him on account of the wire that he had picked up from the night that we worked. But I was—he asked me if the stuff—if I had seen any wire in his car. I told him, I said, "They're crazy, because I was inside your car, riding in your car and looking your car over. How could there be any stuff inside your car? When I was in there there was nothing there."

Q. You say that was about five or six days after you drove the car around the lot that Mr. Teague came to you?

A. I couldn't recall it now; it was somewhere around there, three or four days, six days, around there.

Q. When Mr. Teague came to you and told you this, how are you able to fix March 6, 1957, as the date on which you saw his car for the first time and drove it around?

A. Well, I don't know; I am just telling you what time I looked at his car and drove his car around, because that was the first time his car was down there.

(Testimony of Ernest C. Reid.)

Q. And you work over there——

A. If that was March 6th, it must be March the 6th.

Q. Did you work every day during that week?

A. Yes.

Q. Could you have seen the car for the first time on March [233] the 4th?

A. No, I couldn't.

Q. I beg your pardon?

A. I couldn't, because I park in the same lot as he does.

Q. Could you have seen the car for the first time on March the 5th? A. I wouldn't know.

Q. Could you have seen the car for the first time on March the 7th instead of the 6th?

A. I am pretty sure I seen it that same night we worked. That is when I seen the car and that is when I drove it.

Q. Was March 6th the only—withdraw that. Do you know whether you worked March 6th overtime?

A. Well, I know, yes.

Q. How do you know?

A. Because I keep track of the overtime in our gang.

Q. Do you have any record that you have consulted to——

A. Yes, I believe I do down at the pier.

Q. ——to determine whether or not you worked March the 6th?

A. Yes, I have down at the shop.

Q. You have it at the shop? A. Yes.

(Testimony of Ernest C. Reid.)

Q. What other nights did you work overtime that week? A. I have it all in that record.

Q. I beg your pardon? [234]

A. I say I have it all in that record.

Q. Have you looked at the record recently? You don't have the record with you?

A. No, not recently.

Q. March the 6th wasn't the only night that you worked overtime that week, was it?

A. I would have to look at the record on that.

Q. Have you been elsewhere with Mr. Teague besides in San Francisco, Mr. Reid?

A. What do you mean?

Q. Have you been in other cities in the country with Mr. Teague? A. No.

Q. Besides in San Francisco? Have you ever been in Los Angeles with him? A. No.

Q. Were you in Los Angeles with him in 1948?

A. '48?

Q. '48? A. No.

Q. After you drove the station wagon——

The Court: He didn't answer, did he?

Mr. Petrie: I beg your pardon, your Honor. He did. He said no, that he was not.

Q. You have never been in Los Angeles with Mr. Teague, is [235] that right? A. Come again.

Q. Have you ever been in Los Angeles with Mr. Teague? A. No, not with him together, no.

Q. No. That is what I am asking you. Coming back to the night that you did drive this station

(Testimony of Ernest C. Reid.)

wagon around, where was your car parked or your pickup? A. In the parking lot.

Q. In the parking lot? Will you indicate on the diagram where your car was parked?

A. Well, I would say somewhere around there (indicating).

Q. That is quite close to where you indicated that Mr. Teague's car was parked.

A. Well, we all park together around there.

Q. Didn't you park at that time in March of 1957, nearer the utility building at the end of the pier? A. At the end of the pier?

Q. Near the utility building?

A. Mr. Sledge don't allow us to park down there.

Q. I am asking you about March, 1957. In March of last year didn't you park closer to the end of the pier next to the utility building instead of in the middle of the depressed area?

A. You mean over here?

Q. That's right. A. No. [236]

Q. Wasn't Mr. Teague's station wagon parked there when you first saw it? A. No.

Q. When you were driving the station wagon around was Mr. Teague with you?

A. Yes, he was with me.

Q. And when you finished driving the station wagon what did you do with it?

A. I parked the car and Teague slides over to his side, the driver's side, and I got out and jumped

(Testimony of Ernest C. Reid.)

in my pickup truck and he went ahead of me and I followed him out the gate.

Q. Did you both leave the area as soon as you had finished driving around in the station wagon or did some time elapse in between?

A. No, there was no time elapsed. There was no use hanging around any more when we got through work.

Q. And is that the only time you left the parking area with Mr. Teague—you in your truck and he in his car?

A. No, we usually all get out at the same time every day and we follow each other out. It is kind of heavy traffic when we get out of work down there.

Q. Did you often work overtime together and leave the area at the same time of the evening together? A. We do.

Q. Do you remember what time of the evening it was when [237] you left on this particular occasion?

A. I stated before it was around about quarter to ten, ten o'clock, quarter after ten; I don't really recall the time.

Q. Did you stop with your pickup truck for an inspection by the guard when you left the area?

A. Yes. If I didn't see the guard wave his hand to go ahead, I would stop. If he had waved his hand, I would go ahead.

Q. Did he wave his hand to go ahead that night or did he ask you to stop?

(Testimony of Ernest C. Reid.)

A. I slowed down at the gate and he seen it was my truck so he waved his hand.

Q. He waved you on. Did you buy a Chevrolet station wagon or something else?

A. No, I couldn't go that high; I bought a cheaper one.

Q. A sedan? A. Yes.

Mr. Petrie: I think that is all.

The Court: That is all.

Mr. Roos: I have no questions.

The Court: That is all.

Mr. Roos: Thank you, Mr. Reid.

Mr. Teague.

EDGAR HAROLD TEAGUE

the defendant, called as a witness in his own behalf, being first duly sworn, testified as [238] follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Edgar Harold Teague.

Direct Examination

By Mr. Roos:

Q. Mr. Teague, where do you live?

A. At present?

Q. Yes.

A. 6245 Cypress Avenue, El Cerrito.

Q. And your business or occupation is what?

A. I am a leaderman for American President Lines, painter.

(Testimony of Edgar Harold Teague.)

Q. And how long have you held that same job with the American President Lines?

A. I started in May, 1950.

Q. And you worked for them continuously since that time? A. I have.

Q. On the same job? A. I have.

Q. There has been some testimony here about a new 1957 station wagon. Did you acquire one in March of 1957? A. I did.

Q. Do you remember what date you got possession?

A. I do. Eleven-thirty on the 5th day of March.

Q. And what was the first day you took it to work?

A. The 6th—the morning of the 6th. [239]

Q. In the early part of March, 1957, were you the plaintiff in a personal injury case that had been settled? A. Yes, I was.

Q. And had the settlement been agreed upon before or after March 6, 1957?

A. Yes, it had.

Q. Before or after? A. It was before.

Q. And you actually got your check a few weeks later, did you? A. Yes, I did.

Q. Do you remember how much you got?

A. $7,350.

Q. You live in El Cerrito now?

A. Yes, I do.

Q. And before that where did you live?

A. I lived at 111-37th Street.

Q. You are married, are you? A. Yes.

(Testimony of Edgar Harold Teague.)

Q. And that is Mrs. Teague here in court?

A. Yes.

Q. And how long have you been married?

A. Ten and a half years.

Q. And do you and Mrs. Teague have any children? A. Yes, we do. [240]

Q. How many have you had?

A. My own and my adopted son.

Q. Your own?

A. My own, one; I had two.

Q. One was run over by an automobile last year?

A. Yes, it was.

Q. And Mrs. Teague had some children by a previous marriage? A. Yes.

Q. How many? A. Three.

Q. And what are their ages now?

A. Now? 22, 20 and 18.

Q. And going back to the first week in March, 1957, how many children were living at home with you? A. Four.

Q. That was two stepchildren and two of your own children? A. Right.

Q. And one of the stepchildren was Jim Daniels?

A. That's right.

Q. Now, you heard the testimony in court about this copper wire, Plaintiff's Exhibit 2?

A. Yes, sir.

Q. Did you steal that copper wire from Pier 50?

A. No, sir.

Q. Did you steal it from any other place? [241]

A. No, sir.

(Testimony of Edgar Harold Teague.)

Q. Did you steal it at all? A. No, sir.

Q. Did you ever see the wire before?

A. I have seen—it looks like it.

Q. Where did you see it?

A. On the street, on Berry Street; at the Embarcadero and Berry.

Q. And when was that?

A. The night of the 6th.

Q. About what time in the evening?

A. It was after ten o'clock, say around, oh, probably ten, ten past ten, or something like that; in the neighborhood of that.

Q. And what did you do with the wire?

A. I put it in my car.

Q. And what did you intend doing with it?

A. I was going to find out if it was worth anything and then maybe probably sell it.

Q. Did it have any tags that showed the name of the owner on it?

A. No; they had a tag on it but no owner tag or nothing like that to me—no address or anything like that to me.

Q. I show you this tag, Plaintiff's Exhibit No. 3, which says on it "FH3916, Kobe," and under the number 174. Was that the tag that was on the wire? [242] A. Yes.

Mr. Roos: You may cross-examine.

(Testimony of Edgar Harold Teague.)

Cross-Examination

By Mr. Petrie:

Q. Do you have the tag, Mr. Teague?

A. No, I do not, sir.

Q. When you saw Government's Exhibit 3, that tag that said Kobe, you realized, didn't you, that "Kobe" meant Kobe, Japan? A. No.

Q. What did you think it meant?

A. Well, absolutely nothing to me, to tell you the truth.

Q. Did you know that there was a place in Japan called Kobe on that night that you discovered the wire? A. It didn't enter into my mind.

Mr. Petrie: Would the reporter read the question?

(The reporter read the question.)

A. No. I knew there was a place in Japan named Kobe, yes.

Q. (By Mr. Petrie): That is my question.

A. Yes, yes.

Q. Where were you parked that night, Mr. Teague? Will you show us on the diagram?

A. In this area right here (indicating).

Q. In the middle of the depressed area?

A. Yes.

Q. You are saying that you were not at the end of the [243] area near the utility building?

A. No, sir.

Q. Did you notice the coils of copper wire stored at the end of Pier C on that night?

(Testimony of Edgar Harold Teague.)

A. No, sir, I don't pay any attention to no cargo, because I am not pertaining to any of the cargo of American President Lines.

Q. What were you doing that night?

A. We was painting a galley on a ship.

Q. What?

A. We was painting a galley on a ship.

Q. On the President Taylor? A. No, sir.

Q. What ship?

A. I think it was President Harrison.

Q. Where was that ship?

A. It was laying on this pier right here alongside of this.

Q. Did you do any work on the President Taylor that night? A. No, sir.

Q. Do you know when the President Taylor docked? A. Yes, sir.

Q. Did it dock around the 6th or the 5th or when?

A. I think it docked the morning or the afternoon—wait a minute, now; I don't know if it was the afternoon of the 5th or the morning of the 6th, because we worked on the Taylor [244] painting the hull on the 6th, that day.

Q. Will you show us on the diagram, Mr. Teague, where the wire was on Berry Street or on the Embarcadero when you found it?

A. Yes, sir, it was right in this section right here.

Q. Will you mark a T-4—— A. T-4?

Q. T-4 where that wire was.

(Testimony of Edgar Harold Teague.)

A. I can't get it to mark.

Q. You are marking over the scotch tape?

A. Yes.

Q. In the middle of Berry Street where it runs into the Embarcadero? A. That's right.

Q. Were all five coils together or——

A. No, there was one laying, oh, a considerable distance, I would say approximately as far as from here to the—to that—what do you call that—right behind those people sitting right there, one coil by itself and then——

Q. I am not following you. You say the first coil that you saw was that far away from your car when you saw it? A. No.

Q. I misunderstood you, then; I want to make sure that I did understand.

A. I say it was laying about that far from the other coils.

Q. Was the coil alone closer to you than the other four [245] coils? A. That's right.

Q. How far away was it from your car when you first noticed it?

A. The other was, oh, I would say approximately fifteen or twenty feet nearer it.

Q. The first coil was fifteen or twenty feet from your car when you discovered it?

A. No, the other coils was——

Q. The other coils were fifteen or twenty feet from the first coil? A. No, from my car.

Q. What about the first coil?

(Testimony of Edgar Harold Teague.)

A. Well, it was actually in the rear of my car at that time when I got my car stopped.

Q. Did you run over it? A. Yes.

Q. Is that what caused you to stop?

A. That's right, sir.

Q. Do you remember telling Mr. Barthol during his first interview with you that you saw the first coil ahead of your car and you stopped the car short of the coil?

A. Yes, I did, because——

Q. How do you reconcile that with what you are saying now?

A. I forgot about running across this one first at that [246] time; that's right.

Q. How many painters work under you, Mr. Teague? A. Under me?

Q. Yes. A. Five other fellows.

Q. Are they all painters? A. Yes.

Q. Is Mr. Reid one of them?

A. Yes, he is.

Q. Had you at any time during your work for American President Lines noticed as cargo waiting to go out, wire similar to the wire that we have here?

A. I never paid any attention to no cargo; maybe a new automobile or something like that.

Q. Don't you ever look at what cargo is on the Pier, Mr. Teague?

A. No, sir. I have no consumption of the cargo going out or in on those docks.

Q. Are you telling us that you have never seen

(Testimony of Edgar Harold Teague.)

any cargo stored on the docks? A. Oh, yes.

Q. Waiting for a ship to go out.

A. I could walk down to the end of the pier and you could ask me what cargo is sitting there and I couldn't tell you.

Q. Can you recall now any particular kind of cargo that [247] you have seen on the pier waiting to go out?

A. No; automobiles, I could recall them.

Q. Other than automobiles, anything else?

A. No. They have all kinds of general cargo going out of these piers.

Q. You have worked down there almost daily through the years, haven't you? A. Yes, sir.

Q. Much of the cargo is uncovered, isn't it, that is, not crated? Aren't they stored on pallets or stored out in the open? A. Oh, yes.

Q. Some of the cargo is not covered so that you can see what it is if you pay any attention to it?

A. Oh, that's true.

Q. Have you been down to the docks of the Pacific Far East Line?

A. Oh, yes, I worked there.

Q. What piers does that company occupy?

A. Right at the present?

Q. At the present time.

A. At present it covers 44 and 46, at present.

Q. Are those shown on our diagram?

A. Yes, these two piers here (indicating).

Q. Those are piers at the end of Berry Street,

(Testimony of Edgar Harold Teague.)

where Berry Street runs into the [248] Embarcadero? A. That's right.

Q. How many times have you been down to those piers in the last three or four years?

A. Oh, approximately maybe four or five times.

Q. Have you noticed——

A. Pardon me. Excuse me. You mean inside the piers?

Q. Yes, actually down on the pier.

A. Approximately about four or five times.

Q. During those occasions did you notice cargo on those piers waiting to go out?

A. No, because my incident down there was to see about boats, the way they was doing their work for painting preparations, because we have another—considering—that they have the same kind of statute with PFE that we do.

Q. In March, 1957, for example, you knew that the Pacific Far East Line was shipping cargo from those piers, didn't you?

A. Oh, yes. Wait a minute. You mean '46?

Q. No, March, 1957. A. Oh, yes.

Q. At the time we are concerned about here.

A. Gee, I don't think they moved over during that time; they was at 45 at that time. You see, actually we used to have those piers.

Q. 45 is just off?

A. No, it isn't. Oh, 45, it is eight miles down on the [249] other end of the waterfront; it is down on Fisherman's Wharf, 45.

Q. What is the pier next to 44? A. 42.

(Testimony of Edgar Harold Teague.)

Q. Oh, they are even numbers?

A. Even numbers is north—no, south of the Ferry Building, and the odd numbers is north.

Q. Do you know when Pacific Far East Line moved to Piers 46 and 44?

Mr. Roos: Your Honor, I don't want to object, but I think he is getting awfully far afield.

The Court: Sustained.

Q. (By Mr. Petrie): Do you know that either American President Lines or Pacific Far East Line was occupying Piers 44 and 46 in March of 1957?

A. Not American President Lines, no.

Q. What was the predecessor company? What company preceded Pacific Far East Line?

A. Not offhand, I couldn't say, because I know PFE has them now.

Q. Those piers were being worked in March of 1957, were they not?

Mr. Roos: This is still the same line of questioning, your Honor; it is completely immaterial.

The Witness: I can't recall on that. [250]

Q. (By Mr. Petrie): You don't know if they were or not?

A. I will tell you one thing; I think the Lalani used to come in there once to load passengers.

Q. When you discovered that wire in Berry Street, Mr. Teague, didn't it occur to you that it might belong to a shipment going out from one of those piers along the Embarcadero?

Mr. Roos: To which we object as incompetent, irrelevant and immaterial, what might have oc-

(Testimony of Edgar Harold Teague.)

curred to the witness. He has already testified on direct he found it and intended to sell it.

The Court: Overruled.

Q. (By Mr. Petrie): Didn't that cross your mind?

A. No, sir, it didn't. Absolutely not, not when it was laying in the middle of the road.

The Court: Why did you pick up the wire?

A. Your Honor, I will tell you. I was coming home that night—that's the way I go home every night—and I was proceeding on home. Gee whiz, that would be just like you walk out of here right now and I get in my car and I found something in the middle of the highway, I would pick it up, just common nature to do it.

The Court: But this weighed 500 pounds; pretty heavy to pick up, wire that weighed 125 pounds at a crack.

A. It is not very heavy to me, sir. [251]

Q. (By Mr. Petrie): When did you see Mr. Daniels to tell him about getting a heater or radio in the station wagon? A. In the morning.

Q. In the morning following your going home?

A. Yes.

Q. Did you tell him that there was wire in the station wagon? A. Yes, I did.

Q. Did you tell him to sell the wire?

A. No, I asked him to get me a price, to see what it was worth.

Q. Did you tell him what it should be worth?

A. No, I did not.

(Testimony of Edgar Harold Teague.)

Q. Didn't you tell him that he should get a price of 30 to 35 cents for the wire?

A. Oh, gee, I have no idea how much that stuff would be worth.

Q. You have had some experience in selling similar items, have you not, Mr. Teague?

A. Pardon me, sir?

Q. You have had some experience in selling similar items before? A. Oh, absolutely.

Q. Have you sold wire before?

A. No, sir. [252]

Q. Have you sold nozzles and fittings?

A. Yes, I have.

Q. On how many occasions?

A. Oh, I would say approximately maybe four or five times.

Q. Where have you sold those nozzles and fittings? A. Over in Oakland.

Q. To what company?

A. Right now I couldn't—I really don't know right now, no, sir.

Q. What kinds of nozzles and fittings were those?

A. Off of the end of hoses—waterhoses.

Q. Where did you get them?

A. Out of the dump; they discard all these things into boxes that they are going to take out to the dump.

Q. Who discharges them? Someone in the American President Lines?

(Testimony of Edgar Harold Teague.)

A. Oh, yes, they take them off of ships in garbage cans and put those in boxes, stuff like that.

Q. Did you take them out of there or have you taken them out of there from time to time?

A. Yes, I have.

Q. Did you have the permission of anybody to do that? A. No, no, I don't.

Q. Did you hear from Mr. Daniels on March 7th about this wire? [253]

A. Yes, he said——

Q. About it being taken over by the Richmond Police Department? A. Yes, I did.

Q. Did he call you or did he come to see you?

A. No, when I got home I was informed about it.

Q. On the evening of March 7th? A. Yes.

Q. And did you go the next day——

A. Yes, I did.

Q. ——to see Inspector Middleton?

A. Yes, I did.

Q. Do you know anybody shipping aboard the President Taylor on that voyage to Japan, Mr. Teague? A. No.

Q. Didn't you know anyone on the crew?

A. Not—no, sir.

Q. Do you know Mr. Voeks? A. Voeks?

Q. Voeks—V-o-e-k-s.

A. No, sir, I don't think so. There is a—I'll say that—pardon me, but there is a lot of people I know them by face, but I don't know their names.

Q. Well, to your knowledge now did you know anybody aboard the President Taylor? [254]

(Testimony of Edgar Harold Teague.)

A. Not as I recall, sir.

Q. On that voyage? A. No, sir.

Q. Did you know when the President Taylor was supposed to get to Japan? A. No, sir.

Q. Did you know what its first port of call was in Japan? Did you know that it was Yokohama?

A. No, sir.

Q. Suppose you would want to send a letter to somebody on the President Taylor and get it to them at the first port the ship hit in Japan, how would you address the mail? To the American President Lines office in Yokohama or Tokyo, or how would you address the mail?

A. Well, yes; I guess I would, yes.

Q. You have done that from time to time, haven't you?

A. No, sir, I don't write.

Q. You have never written——

A. Never written a letter to a man on a ship.

Q. But you know you can do that by sending a letter through the American President Lines office, do you not?

A. I suppose—very likely so, yes.

Q. Was there any reason for sending Mr. Daniels to find out about the price of wire rather than taking care of that yourself, Mr. Teague? [255]

A. Well, I had already had an arrangement to have a radio put in my car, and the man told me to bring it back the next day or when ever I had a chance to bring it in, and so at this time I figured I would let my kid put the radio in the car and while

(Testimony of Edgar Harold Teague.)

he had the car he could check to see how much that was worth.

Q. Did you go to work on March 7th?

A. Yes, I did.

Q. Did you take Mr. Daniels' car to work on that occasion? A. Yes.

Q. Did you tell anyone in the American President Lines about your discovery of the wire on the night before?

A. Not as I recall; I can't recall that.

Q. Did you tell anyone on March 7th about finding the wire on Berry Street the night before?

A. No, not as I can recall, no.

Q. Where did you work before you went to work for American President Lines, Mr. Teague?

A. I was on a ship, the Rolandi.

Q. I beg your pardon? I didn't catch that name.

A. I was on a ship, the Rolandi.

Q. How long were you on that ship?

A. Oh, approximately two—approximately two and a half months.

Q. What ports of call did that ship make? [256]

A. It run north up to Vancouver—no, some ports up the Columbia River there; Coos Bay, that's it.

Q. Did it call only at ports in the Western Hemisphere? A. No, it went——

Q. Did it go to Japan?

A. No, no, it was just—it is a little bit of a scow.

Q. What did you do before that?

A. I used to work with PFE—Pacific Far East Line.

(Testimony of Edgar Harold Teague.)

Q. During what period?

A. That was from '48—about half of '47, I would say, to around, oh, April of '49.

Q. What was your job with that company?

A. Painting; painting, the same as——

Q. The same job?

A. No, not the same; the President is like leaderman, but painting hulls and working inside the ships.

Q. Was that work in San Francisco?

A. Yes, it was.

Q. At what pier? A. At Pier 45.

Mr. Petrie: Can I have just a moment, your Honor?

That is all.

The Court: Any other questions?

Mr. Roos: I have no further questions. Thank you.

The Court: That is all. [257]

Do you have another witness?

Mr. Roos: Yes, your Honor.

The Court: I think we had better take the recess. It is getting rather warm here.

Mr. Roos: Your Honor, may we talk about this matter before you recess?

The Court: The jury may be excused.

(Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury:)

Mr. Roos: Your Honor, on the question of this

weighmaster's certificate, Section 12,704 of the Business and Professions Code seems to cover it. The certificate is a form specified by the State; the seal is issued by the State; public weighmaster's certificate forms shall be the property of the State. It is a misdemeanor—all public weighmasters must keep and preserve records for four years, true copies of all certificates. Any person who abuses the use of the certificates, requests a false certificate, any weighmaster that issues a false certificate, and so forth, is guilty of a misdemeanor.

They seem to be issued under authority of State law, but I can't find anything, and Mr. Haid hasn't either, specifically as to the admissibility of a certificate in evidence; but it certainly seems to have all the attributes of a public certificate.

The Court: There is some provision of the [258] California Code that provides that such public documents are admissible, is there?

Mr. Haid: Yes, there is, your Honor. In the California Code of Civil Procedure there is a provision concerning public records, but there is no specific provision in that Act covering this particular kind of thing, and I can't find it—in the few minutes that I have had rushing around, I couldn't find any case which said it was a State certificate.

The Court: Do you consider it of sufficient importance that we have to consider this matter further?

Mr. Haid: Incidentally, your Honor, I might say that I called Mr. Gallagher, the gentlemen who issued this thing, and he said he would be happy to

get himself up here but he is all by himself this afternoon; his girl is sick or something or other and he is by himself, otherwise he would come up and identify it.

Mr. Petrie: I just can't understand, your Honor, why this wasn't done in the proper fashion by calling the weighmaster. Mr. Burroughs tells me that the coils were on the truck and that the whole thing was weighed at one time.

Mr. Roos: That is always the way it is done.

Mr. Petrie: Apparently something was subtracted.

Mr. Roos: The truck is weighed with the coils on it, then the coils or the material to be weighed is taken off the truck and then the truck is weighed without them, and that [259] gives the tare weight.

Mr. Petrie: We don't know when that was done. Mr. Burroughs didn't notice it being done either.

The Court: In other words, Mr. Burroughs just went with the true?

Mr. Petrie: Went with the truck with the evidence.

The Court: It was weighed while he was there with the stuff on it and then he left with the truck with the stuff on it?

Mr. Petrie: Yes. I don't think the coils were ever off the truck while Mr. Burroughs was there.

Mr. Haid: That is the regular way of doing it. I talked with Mr. Gallagher and he had told me exactly how it was done. He said he would be happy to get up here but that his girl was away.

The Court: There is this 530 pound report. If you want it in evidence——

Mr. Roos: Yes, very definitely.

The Court: There seems to be some question about it now. If you want it in evidence, have the man here the first thing in the morning if you consider it important.

Mr. Roos: I have to have the case go over another day. I never heard of such a thing. Here is the FBI agent goes along to the public weighmaster and then evidently went out just for a short beer or something—— [260]

The Court: You are not arguing this case with somebody on the street, counsel. The FBI man didn't go along just to be a witness; he went along because this was government exhibit property, and it is not his fault, and there is no use blaming him for it. It is your evidence that you want to get in. If you haven't got the proper foundation for it, it is your fault.

Mr. Roos: We never dreamed it would be questioned, your Honor. That is why I had Mr. Petrie send Mr. Burroughs.

The Court: If it is so important, the difference between 530 pounds—and what was the other figure?

Mr. Petrie: 460.

The Court: If that is so important, then it is important to find out whether or not the weighmaster's record of the tare is accurate or not.

Mr. Roos: We will get him in the first thing in the morning.

The Court: All right; if you consider it impor-

tant, I am not going to bar you from this evidence. I can't see the slightest importance to the matter one way or the other, but you seem to think so and it is your case, not mine.

Mr. Roos: I will have him here in the morning or I will have him here at four o'clock if your Honor wants us to subpoena him.

The Court: All right. [261]

Mr. Roos: I only have one more short witness, your Honor it might delay things and keep the jury here.

Mr. Petrie: Your Honor, perhaps I can talk to this weighmaster over the telephone; I don't want to hold the matter up.

The Court: Well, leave it in abeyance and see whether you can't work it out between the two of you.

You have one more short witness. What is it that he told you? Why don't you tell the United States Attorney? There is no secret about it. What did he say to you?

Mr. Haid: He said Mr. Burroughs came down with the fellow on the Lyons Van & Storage truck. He says they weigh everything together and then they weight the truck separately and subtract the weight of the truck.

The Court: That is what the FBI agent said?

Mr. Roos: That is not so. I didn't understand Mr. Burroughs to say that. He said he wasn't there. He said he left.

Were you there every minute of the time?

Mr. Burroughs: The Lyons truck came here to

the post office building and the men from Lyons loaded the truck with the wire. I got in the truck. We drove out to these scales. I got out of the truck. They weighed the truck. He already had some figures on some paper, apparently from a previous weighing of the truck, at which weighing I was not present. I [262] got back into the truck with the truck driver. We drove back here to the post office. We took the coils out of the truck and placed them back in the Marshal's office and the truck departed.

Mr. Haid: The way I understand the picture, he said he weighed the truck separately. I don't know how you get the weight of the truck.

Mr. Petrie: I will try and satisfy myself on that, your Honor.

(Discussion between Court and counsel as to further conduct of the trial not included in this transcript.)

(Thereupon, after the recess the jury was brought back into the courtroom and the following proceedings were had:)

Mr. Petrie: Your Honor, the Government will not object to the introduction of the San Francisco Weighmaster's certificate by Mr. Roos:

The Court: All right. It may be marked.

The Clerk: That is Defendant's Exhibit L admitted into evidence.

(Whereupon, Defendant's Exhibit L for identification was admitted into evidence.)

The Court: That concludes all the evidence in the case, does it?

Mr. Roos: No, your Honor. There is one short witness that I expected to be here we found wasn't here and [263] contacted him, and his wife is sick. He is still in Richmond. I instructed him to be here the first thing in the morning. He will only be a very short witness.

The Court: A character witness?

Mr. Roos: I am sorry. I expected him to be here at two o'clock this afternoon.

The Court: A character witness?

Mr. Roos: Yes, your Honor.

The Court: Nine-thirty tomorrow morning?

Mr. Roos: I will see that he is here at nine-thirty.

The Court: Members of the jury, aside from some very brief evidence, the case is closed as far as the evidence is concerned. The attorneys will want to make some argument to you which would make it too late tonight, so will you be here tomorrow morning at nine-thirty and we will try to get the case in your hands tomorrow morning. You may be excused.

(Thereupon, the jury retired from the court-room and the following proceedings were had outside of the presence of the jury:)

The Court: Gentlemen, I take it that we will commence the arguments tomorrow morning some time shortly after nine-thirty?

Mr. Roos: Yes, your Honor.

May I at this time offer Defendant's Exibit [264]

E marked for identification into evidence? It is the March 22, 1957, letter of Captain Johnson to Duncan Ward of the American President Lines.

The Court: That was admitted in evidence.

The Clerk: I still have it marked for identification.

The Court: Is that the letter from the Captain?

Mr. Petrie: That is the letter from the Captain. I objected to it as being incompetent.

Mr. Roos: The Clerk merely has it marked for identification.

Mr. Petrie: The Captain admitted that he wrote something regarding a second check, your Honor. I submit that the letter itself is incompetent.

The Court: Let it be admitted.

Mr. Roos: Thank you, your Honor.

The Clerk: Defendant's Exhibit E admitted in evidence.

(Whereupon, Defendant's Exhibit E for identification was admitted in evidence.)

(Thereupon, there occurred discussion between the Court and counsel as to the length of time required for argument and as to the instructions the Court proposed be given in this case, which was not included in this transcript.)

(Due to the absence of the Judge, the further hearing of this case was not resumed until Monday, September 22, 1958, at 9:30 [265] o'clock a.m.)

Monday, September 22, 1958—9:30 A.M.

(The following proceedings were had out of the presence of the jury:)

Mr. Roos: I wanted to ask your Honor two questions. I have two instructions——

The Court: You can do that now.

Mr. Roos: I wanted to renew my motion for a directed verdict and motion for acquittal made at the close of the Government's case. The only questions I had on instructions——

The Court: Renew your motion at the close of the interrogation?

Mr. Roos: Yes.

The Court: But you haven't completed your case, because you have one character witness.

Mr. Roos: One character witness.

The Court: Would you stipulate, counsel for the Government, that the motion may now have been deemed to have been made at the close of this character witness' testimony with the same force and effect?

Mr. Petrie: Yes, your Honor.

Mr. Roos: Mr. Petrie tells me he is going to have some rebuttal.

The Court: Are you?

Mr. Petrie: Just one witness. I proposed a [266] stipulation to Mr. Roos which he is unwilling to enter into. It will be very short, only one or two questions.

Mr. Roos: There is no question of fact; I just think it is incompetent, irrelevant and immaterial.

Mr. Petrie: Well, perhaps we can argue that out. If Judge Goodman decides it is relevant and material, perhaps you will be willing to stipulate to it.

Mr. Roos: I would.

Mr. Petrie: I have asked for a stipulation, your Honor, that the defendant belongs to the same union as seamen do aboard the American President Line ships. I intend to refer to that fact in arguing a group solidarity that would induce somebody aboard the ship to make five coils out of ten between Yokohama and Kobe, because that is apparently what happened. I think the fact is relevant and material that he does belong to the same union with people aboard that ship.

The Court: What you want is to establish the fact that the defendant belongs to a union which also includes seamen in it?

Mr. Petrie: As making it more likely that someone aboard the President Taylor would help the defendant out by covering for him and converting five of these coils into ten between Yokohama and Kobe.

Mr. Roos: That is fantastic, your Honor.

The Court: I would see no objection to the [267] fact being in evidence as part of the defendant's case on the dock as to what union he belonged to, but I don't see as a basis or relevancy of that fact that seamen belong to the same union would have a proximate relevance.

Mr. Petrie: I have got two thoughts about that, your Honor, to show it is relevant; (1) it would make it more likely that the defendant would be better known to the people aboard the President

Taylor and that they would know him so that he would have somebody to contact; secondly, it would make it more likely that some seaman aboard the President Taylor would be willing to risk his own interest to protect the defendant.

The Court: Mr. Petrie, I think I would hold against you on that. I think that is in the realm of speculation. I don't think you would be entitled to make that argument.

Mr. Petrie: I will abide by your decision on it, your Honor. That was the thought that I had.

The Court: That would be in the realm of speculation and conjecture and would not, I think, fall reasonably within the area of circumstantial evidence.

Mr. Petrie: I will not pursue it.

Mr. Roos: Thank you, your Honor.

The Court: Then you have just the one witness, the character witness?

Mr. Roos: Yes, your Honor.

The Court: Do you have one other matter with [268] respect to instructions you wish to take up?

Mr. Roos: Just in reviewing notes the other day, your Honor didn't mention giving the usual instructions on character evidence, and I presume it would be given.

The Court: It may be considered along with other evidence. That is the usual instruction.

Mr Roos: It is sufficient to raise a reasonable doubt.

The other instruction was I presume your Honor

would give the general instruction that the witness is presumed to speak the truth.

The Court: Oh, yes, I give rather fully on the subject of presumptions in that regard.

Mr. Roos: If it is stipulated that the motion be made now with the same force and effect as though it were made at the close of all the evidence—as I understand it, you stipulate to that, Mr. Petrie?

Mr. Petrie: So stipulated.

Mr. Roos: I would like to move at this time, your Honor, for a judgment of acquittal on the grounds that the evidence is legally insufficient here to sustain a conviction; primarily on the ground that it is legally insufficient to prove a corpus delicti; in other words, that these five coils of wire was ever stolen from this ship, aboard the President Johnson. 186 coils went aboard and 186 coils went off. As far as any [269] weight discrepancy is concerned, the weight discrepancy, if we accept the 22,000 pounds at Federated Metals is accurate, and accept the 21,501 pounds at Japan pursuant to the Japanese weighmaster's certificate as accurate, we have a discrepancy of 499 pounds. That doesn't jibe with either the FBI weight in Richmond for this wire of 531 pounds, or the weighmaster's certificate of last week at Lyons Van & Storage of 460 pounds. There is absolutely no evidence to show that this wire came from that shipment and no corpus delicti has been proven.

The Court: I considered the point that you raise in connection with your motion at the conclusion of the Government case.

Mr. Roos: Yes, your Honor.

The Court: I am satisfied that it is a jury question. I will deny the motion.

(Thereupon the jury was brought into the courtroom and the following proceedings were had:)

The Court: Good morning, ladies and gentlemen. I am sorry that we had to continue the case to this morning, but I have one of these old-fashioned doctors and he wouldn't let me come back here on Thursday morning.

The defense has one short witness, and then we will proceed to hear the argument of the lawyers.

All right, Mr. Roos. [270]

REVEREND ROBERT D. LEWIS

called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court and to the jury?

The Witness: Reverend Robert D. Lewis.

Direct Examination

By Mr. Roos:

Q. Where do you live, Mr. Lewis?

A. 736 South 46th, Richmond.

Q. And what is your occupation?

A. I am Pastor of the First Southern Baptist Church.

Q. And where is that church located?

(Testimony of Rev. Robert D. Lewis.)

A. It is located at 47th and Potrero in Richmond.

Q. And is the defendant, Ed Teague, and members of his family members of that church?

A. Yes; they are.

Q. Do they attend regularly?

A. Yes; they do.

Q. How long have you known Mr. Teague?

A. I have known Mr. Teague approximately the time that I have been Pastor of the church, which is going on my third year.

Q. And would you tell us in what connection you have known him?

A. I have known him as his Pastor. I have ministered to [271] his family. Mr. Teague is, like I have already said, faithful to the church. He is working with about thirty RA boys, which is the Royal Baptist group of our church. He is also a Sunday School teacher, will be this year, of an intermediate boys' Sunday School class, and I some time administer to the needs of the Teague family in the loss of their little boy also.

Q. Would it be accurate to say that your relationship with him has been closer than your relationship with the average member of the church?

A. Due to the tragedy that struck his home, yes.

The Court: Would you mind answering that question, Reverend? Is that true?

The Witness: Well, I will have to answer it this way, because I do not show partiality to my members——

(Testimony of Rev. Robert D. Lewis.)

The Court: Why don't you ask him another question?

Q. (By Mr. Roos): What I mean is, would you say that you knew him better, had been in closer contact with his family, than you have been with the average member?

Mr. Petrie: I will object to that as calling for a conclusion, your Honor.

The Court: Sustained.

Q. (By Mr. Roos): I take it, Reverend, that your connection with the Teague family has been more than just seeing them in church on Sunday?

A. Yes. [272]

Q. From your contacts with him and what you have known about him, would you tell us whether or not you are familiar with his general reputation for honesty and integrity in the community in which he lives? A. I have——

The Court: Just answer "Yes" or "No," if you will, please.

A. Well, yes.

Q. (By Mr. Roos): Are you familiar with it?

A. Yes; I am familiar with it.

Q. And what is his reputation for honesty and integrity? A. It's good.

Q. And during the time that you have known him, other than with regard to the offense for which he is on trial here, have you ever heard anything against him? A. No; I haven't.

Mr. Roos: Thank you, very much, Reverend. You may cross-examine.

(Testimony of Rev. Robert D. Lewis.)

Cross-Examination

By Mr. Petrie:

Q. Reverend Lewis, how long has Mr. Teague been a Sunday School teacher?

A. This is Mr. Teague's first year.

Q. You mean he is going to start this Fall to teach? A. Yes. [273]

Q. Or he has started this Fall to teach?

A. Yes.

Q. When did Mr. Teague lose his boy?

A. I would have to call on someone else; I don't know the exact date, but it has been several months ago.

Q. Was it this year or was it last year?

A. It was this year, I believe.

Q. Prior to Mr. Teague's losing his boy, did he attend church regularly?

A. He was not as regular in attendance before he lost the boy, no.

Mr. Petrie: I have nothing further.

The Court: That's all.

Mr. Roos: The defendant rests, your Honor.

The Court: Are you ready to proceed to argue the matter?

Mr. Petrie: Yes. Shall I proceed, your Honor?

The Court: You may.

OPENING ARGUMENT TO THE JURY ON BEHALF OF THE GOVERNMENT

Mr. Petrie: May it please your Honor, Mr. Roos and ladies and gentlemen of the jury: This will be the Government's opening argument. I will be followed by Mr. Roos who will make the closing argument for the defendant. The Government then has an opportunity to make the final closing argument. It is proper that the Government should both open and [274] close, because it carries the burden of proof and that is a heavy burden in a criminal case.

After argument, Judge Goodman will instruct you on the law. We lawyers may anticipate his instructions in one regard or another, but I know I don't need to tell you that what Judge Goodman tells you the law is is what you accept as the law.

I am going to try to give you the Government's view of the evidence now. I will be commenting on the evidence. If your recollection of what the witnesses have said, or if your recollection of the documents differs from mine, of course, you rely on your recollection and not what I say.

What is the charge? The defendant is charged with stealing from a wharf, with intent to convert to his own use, copper wire which was a part of a foreign shipment and which is worth more than $100.

First, are you satisfied that there was a foreign shipment? I don't think there is much question of that. Mr. Teller of Federated Metals told you about

the transaction. His company sold to a New York broker 186 coils of copper wire. The New York broker in turn sold those 186 coils to a Japanese consignee and the coils were directed to Kobe, Japan. Mr. Rowland from American President Lines introduced the photostatic copies of the bill of lading and other documents. That is Government's Exhibit 7-A. That is an exhibit which, together with the other [275] exhibits, you may call for and examine in the jury room if you like. I expect Judge Goodman to instruct you that you may consider the bill of lading showing the shipment of 186 coils from San Francisco to Kobe, Japan, in the absence of any contrary evidence, to be evidence that there was such a shipment. So I don't think that you should be troubled about the fact that there was a foreign shipment in this case.

Was the material stored at the wharf? Again, and while this was a very short case, because of the intervening few days, it may be helpful to you for me to recall briefly the evidence. You will recall that three witnesses: White, the truck driver; Schearn, the man who loaded the coils onto the President Taylor; and Captain Sledge—all placed the wire at the end of Pier 50, at the end of Shed C. You recall that Delehanty, the incoming checker, placed it at the end of Shed D; but you may well think, in view of the testimony of the others, that Delehanty was mistaken. In any event, the material was certainly stored at the end of the wharf.

Now we come to the crucial question in the case: Were the five coils of copper wire part of this

foreign shipment? Several witnesses testified that the wire was identical in kind to that included in the shipment. But you have a direct link, linking these five coils of wire with the 186 coils in the shipment, don't you? That is Government's Exhibit 3. That is the tag, you recall, that reads, "FH3916, Kobe," with the number [276] 174 on the right-hand side, and the same matter printed on the reverse side of the tag. That is the tag that Mr. Calkins from Federated Metals identified as the tag that he placed on the 174th coil in that shipment. You remember he said he tagged each of the 186 coils in the shipment with such a tag and that this tag bears the number 174 because it was placed on the 174th coil. So there can't be any question about this. Mr. Calkins identified it and the defense has made no attempt to contradict his testimony.

Officer Middleton told you that when he took the five coils from the station wagon of the defendant at the Richmond Iron & Metal Company this tag was lying on top of one of the coils. It was the only tag that was recovered. That is the link, the Government submits, ladies and gentlemen, that shows you beyond question that these five coils came from that shipment.

The defendant, after the testimony of Officer Middleton, admitted that he saw that tag when, as he says, he picked up these coils of wire on Berry Street.

That is the starting point. You should be satisfied from that that these five coils came from the shipment of 186 coils; that those five coils never

left San Francisco, and they never reached Japan. And that is confirmed by Captain Johnson's count of 181 coils at Yokohama when the boat first docked. You will recall that he told you that he checked the [277] shipment of coils; that a Japanese checker checked the shipment of coils and that his Mate, Foley, checked and all their figures correspond; there were 181 coils. That is to be expected because you know that the five coils did not leave San Francisco.

Then we have the strange occurrence that by the time the boat reaches Kobe three days later, there are 186 coils. You will recall that the coils are of irregular size. Now, if you are satisfied, as I submit you must be, that only 181 coils left San Francisco—if you are satisfied as to that, then the only explanation for their still being 186 coils at Kobe after the count of 181 in Yokohama is that someone aboard that ship made ten coils out of five—some seaman, some friend of the defendant's made ten coils out of five—to cover up for the defendant and to protect him.

Mr. Roos: If your Honor please, I hate to interrupt counsel's argument, but is it proper for him to ask the jury to indulge in speculation and surmise?

The Court: I don't think there is any reason for the interruption.

Mr. Roos: I am sorry, your Honor.

The Court: Counsel can make arguments from the evidence just as you can.

Mr. Roos: All right.

Mr. Petrie: You knew, ladies and gentlemen, that 186 coils were shipped by Federated. Mr. Calkins told you that. [278] You know that 186 coils and no more were received at the dock at American President Lines, because Delehanty, the checker, told you that he checked each of the coils off; is that so? That's why I say to you if you are satisfied that these five coils came from that shipment and that they never left San Francisco, then the only explanation for there being 186 coils at Kobe is that someone aboard the President Taylor made ten coils out of five to cover up for this defendant.

We call, in addition, confirmation of that. The weight, according to Mr. Calkins' weighing at Federated Metals, was 22,000 pounds. You can look at Government's Exhibit 8. That is the certificate of the Japanese weighmaster at Kobe. It carried a weight of 21,501 pounds, a differential of about 500 pounds.

Mr. Roos may say that doesn't match the 460 pounds according to the defendant's weight certificate of the weight of these coils a week ago Friday; it doesn't match the 531 pounds. But you may well be satisfied that that approximation is close enough to satisfy you that the shipment was short in weight by the amount that these five coils weigh.

Now we come to the value in this case, ladies and gentlemen. That is one of the elements. You must find that the coils were of a value of more than $100 in order to return a general verdict of guilty; but I expect Judge Goodman to instruct you that

your possible finding that these coils have a value of [279] less than $100 will not prevent you from finding the defendant guilty but that, in that event, you must make a finding that the coils are worth less than $100. I am going to leave the matter of value entirely with you, with just a few observations.

You are going to come to the value of these coils, of course, by using two factors: The weight of the coils and the value of the property at the time that they were taken. Taking the defendant's figures of 460 pounds according to the weighmaster's certificate, and the defendant's lowest price from what dealers would pay according to the American Metal Market publication—that was 23½ cents; you recall that the prices quoted were 23½ cents to 24 cents. Multiply those two factors and I think you get about $108. Giving the defendant the benefit of the figures on the value, you should be satisfied that these coils are worth more than $100.

But in addition, you recall that Brandeis, Goldschmidt, the New York broker, paid 32¾ cents for the copper; that Mr. Barthol weighed them in Richmond and he found they weighed 531 pounds; and Mr. Teller from Federated, subtracting 3 to 4 cents from the price of electrolytic copper, gave it as his best estimate that the going value of copper on March 6, 1957, was about 27 to 28 cents. I am not going to burden you with that. I leave that matter entirely with you.

You recall the testimony placing the defendant on the pier on the night of March 6th. You know

he worked, [280] according to the records, seven hours overtime, from 5:00 o'clock in the evening until 12:00 o'clock at night. Do you remember Mr. Proudfoot from American President Lines testified concerning the payroll records?

Captain Sledge told you that the defendant's car was placed at the end of the pier very close to the utility building, less than a hundred feet from where the copper wire was stored at the end of Shed D.

The defendant says he left at about 10:00 o'clock that evening, and I think you needn't be concerned about whether he left at 10:00 or 12:00 o'clock except in connection with Mr. Reid's testimony. The defendant had plenty of opportunity to take the coils that night. The question that you have got to resolve is: Did he take them? He says he did not. He says he found them on Berry Street.

If you are satisfied that these five coils of wire came from that shipment that was stored within a few feet from his car, you might think it an amazing coincidence that they turned up on Berry Street that very night and that the defendant did not take them. How did they get from Pier 50 to Berry Street if the defendant didn't take them? You know that they were checked in because Delehanty told you that 186 coils were checked in there. White, the truck driver who brought the coils down there, traveled this route coming in from the wharf down Mission Rock Street. You know there is no possibility that any [281] coils on that truck were dropped off on Berry Street. White came in this

way and he returned that way. If the defendant did not take the coils, then you are confronted with a fantastic idea, and that is that someone else was a thief; that that thief took the coils on the same night, took them as far as Berry Street and abandoned them there. Wouldn't that be a fantastic conclusion to come to?

The Government submits, ladies and gentlemen, that the circumstances point irresistibly to the conclusion that the defendant took these coils of wire on that night with intent to convert them to his own use; the following day he told his stepson either to sell them or to find out what he could sell them for. Accordingly, the Government submits that you should be satisfied that the defendant is guilty of this charge.

(The argument of defense counsel and closing argument of Government counsel are omitted from this transcript.) [282]

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen: You have listened to the evidence in this case, I have observed, very attentively, and also to the arguments which the lawyers have made to you. What I have to say to you is by way of aid and help to you in determining the issue in the case and will be very briefly stated to you.

I observed that most of you have not had jury service before. The purpose of the jury is to determine the question of fact in the case. The question

of fact in this case is: Is the Defendant Teague guilty or not guilty of stealing this wire from the dock of the American President Lines?

The decision as to that question of fact is exclusively yours. It is entirely and exclusively your function as fellow citizens of the community to determine that question.

The judge very rarely comments upon the evidence in a criminal case. Occasionally he does. I make no comment to you upon the evidence in this case. You are not to draw any inferences from anything I may have said or done in ruling on objections, or myself making inquiries of witnesses, that I was intending in any way to indicate to you any opinion that I might have as to the guilt or innocence of this defendant. I had no such intent and you are not to draw from anything that may have been said in performing my duties to supervise the trial of the case and to expedite it that I was intending to draw any inferences. [283]

Consequently, it is solely your function to decide the guilt or innocence of the defendant. In like manner, it is exclusively the right of the judge to explain the law to the jury—that is, the law that is applicable to the case—and with that function on the part of the judge, the jury takes no part. You have to assume, rightly or wrongly, that the judge knows what he is talking about when he tells you what the law is.

I say that to you because it does happen very rarely that sometimes men and women come into the jury box with some preconceived notions about

social or legal or economic theories and they proceed to decide what they think the law should be and then decide the case on that basis. That is wrong. We do not permit it. If it were allowed, then no man's life or liberty or property would be safe. Consequently, you must follow the rule that the advice that the judge gives you as to the law is correct and that you must follow it.

And so it is, while we have different functions to perform—you decide the question of fact, the guilt or innocence of the defendant and the judge tells you what the law is—nevertheless, in a manner of speaking we are sort of a team because we both have the same objective and that is to see that justice is done to the best of our respective abilities.

There are some brief rules and principles that apply to all criminal cases and I will give you a few of them colloquially and they may be of help to you in performing your [284] function of determining the guilt or innocence of the defendant.

You will recall that I told you when you were impaneled that there was no presumption that arises by virtue of the filing of the indictment or charge that the defendant was guilty. I repeat that to you now.

It is the duty of the Government—the burden rests upon the Government—to prove that the defendant is guilty beyond a reasonable doubt before you may return a verdict of guilty. The defendant does not have to prove his own innocence as is the case in some continental countries. Here in America we have the Anglo-Saxon system of law and here

the burden is upon the Government to prove the guilt of a defendant charged with a criminal offense beyond a reasonable doubt.

The burden never shifts to the defendant to prove his own innocence.

You must exclude any considerations of sympathy or prejudice from your minds in deciding the case. You must invoke no prejudices against the defendant. You must indulge in no sympathy. You are to decide the case solely upon the basis of the evidence that has been presented here.

You are not to concern yourselves with the matter of punishment of the defendant in the event that you should find him guilty of the offense charged. The matter of imposing punishment in the event of a finding of guilty is for the judge alone in a criminal case. [285]

I have told you that the burden is upon the part of the Government to prove the guilt of the defendant beyond a reasonable doubt. What do we mean when we say "reasonable doubt"? Well, the definition that I give jurors is a very simple one. I say to you that a reasonable doubt means exactly what the term implies: It means a doubt based upon reason; it means the kind of a doubt that you would have after you have put your minds to work on it, after you have put your heads to work on it. It is not a fanciful doubt; it is not a conjectural doubt; it is not something that you reach up to the sky to get, but it is a doubt that results after you have thought about the matter and employed your own reasoning processes. It would be the same as

if you had some momentous decision to make in your own life on some important question and you couldn't make up your mind in it because, after you had applied your minds and your reason to it, you were undecided; you still had some doubt about it. That is a reasonable doubt.

This doctrine of reasonable doubt applies to every phase of the case. You must bear in mind that after you have considered all of the evidence in the case, if you have a reasonable doubt, then the defendant should be acquitted. If you have no such reasonable doubt, then you should find him guilty.

Whether or not you believe the witnesses who have testified in this case and the extent to which you believe them, [286] is a matter for your sole determination.

We start out in every case with the presumption that when a witness comes up and sits in this chair, he is going to tell the truth. However, that presumption may be rebutted by many different factors. It may be rebutted or negatived by the manner in which the witness testifies; by the demeanor of the witness on the witness stand; by whether or not he has contradicted himself or whether or not he has been contradicted by other witnesses; by his relationship to the Government on the one hand or to the defense on the other hand. All of these factors you may consider in determining the question as to whether or not the witness was telling the truth.

And if you find that a witness has sworn falsely in any material fact, then you are justified in not

accepting and rejecting all of the witness' testimony. You should not, however, do that unless the matter in which you find that the witness has testified falsely is a material matter and reasonably bears upon the question of the guilt or innocence of the defendant.

You should disregard any testimony that the Court has stricken out or any testimony given in answer to a question where an objection has been sustained to the question.

The attorneys in this case have argued the case to you. That is their right, and, indeed, their duty. If, however, you should find any variance between the testimony as you recall it [287] as having been given by the witnesses and the testimony as stated to be the testimony by the lawyers in their arguments, then you should disregard to that extent what the lawyers have said and only consider the testimony as you recall it as having been given by the witnesses themselves.

The defendant has taken the witness stand and in this case has testified in his own behalf. That being so, you will consider his testimony according to the standards that I have given you that apply to all witnesses. In addition, in the case of the defendant, you may also consider the interest he has in the case, his hopes and his fears and what he has to gain or lose by any verdict at your hands.

There have been witnesses testify whom we commonly speak of as character witnesses; that is, witnesses who have said that the reputation of the defendant in the community is good. You may con-

sider that testimony along with all of the other testimony in the case in determining the guilt or innocence of the defendant.

There is one other matter that I wish to speak to you about. There has been a reference made to the doctrine of circumstantial evidence. Since this is a case in which circumstantial evidence is involved, I propose to give you some brief advice on that subject.

In the law there are two kinds of evidence, generally speaking; there is what we call direct evidence and what we [288] call circumstantial evidence.

Direct evidence is evidence that is perceptible or observable or otherwise cognizable by the senses. If you see something, if you feel something, if you smell something or if you taste something, that is direct evidence because you have been able to recognize it by your senses. I raise this paper and you know that I have raised this paper because you have seen me do so and you say, "Judge Goodman raised that paper." That is direct evidence, your testimony that you saw me raise the paper.

Another type of evidence that we have is known as circumstantial evidence. That is not the direct evidence of the actual commission of an offense by an eye witness or something of that sort. It is factual matters that are not direct in their character, such as physical facts, documentary facts, scientific facts—things like the wire, the physical fact of the wire; that there was a wharf; a tag has been introduced in evidence; documents have been intro-

duced in evidence; presence of a person at a time and place has been presented in evidence. Those are all circumstances and they are generally considered to be, and they are generally regarded as, and described as circumstantial evidence.

Let me say to you that so far as the nature of evidence is concerned, there is no difference in the law between direct and circumstantial evidence. One kind of evidence is as good [289] as the other. The only important thing is that, whatever kind of evidence is in the case, before there can be a conviction of the defendant of a criminal offense, that evidence must bring about the conviction of the defendant beyond a reasonable doubt before it may be available. In other words, if you are convinced beyond a reasonable doubt by the circumstantial evidence that the defendant is guilty, that is just as good a verdict as a verdict that comes about by reason of the fact that you are convinced beyond a reasonable doubt by direct evidence of the commission of the offense.

In addition, in the case of circumstantial evidence, we also employ a rule or doctrine that where the evidence is circumstantial and is susceptible of the hypothesis of innocence as well as the hypothesis of guilt from the same facts, then there is not proof beyond a reasonable doubt and, hence, there cannot be a verdict of guilty.

You will recall that the indictment that I read to you in this case charges that the defendant on about March 6th, at San Francisco, wilfully stole from a wharf, with intent to convert to his own

use, goods which were part of a foreign shipment of freight and express, to wit: Five coils of used copper wire being shipped from San Francisco to Kobe, Japan, and worth more than $100.00.

It is necessary, therefore, for the Government to have proved in this case beyond a reasonable doubt a number of things: [290]

First, it is necessary that the Government prove that the coils were a part of a foreign shipment—in this case a shipment from the United States to Japan. In determining whether or not this was a foreign shipment, you may consider the waybill or other shipping documents to be sufficient evidence, and in the absence of evidence to the contrary of the places from which and to which such shipment was made. There were shipping documents introduced in evidence in this case and, while I am not intending to direct your conclusion in any manner, I think that there is but very little doubt as to the fact that the evidence is sufficient to show that there was a foreign shipment of copper wire in this case. However, you are free to draw your own conclusions in that regard.

The Government also has to prove that the coils of wire that are in evidence here did not belong to the defendant. You have heard all of the evidence on that subject and you can draw your own conclusions from that.

The Government must also prove that the defendant took the coils or caused them to be taken from a wharf.

The Government must also prove that the coils

were part of this foreign shipment—this alleged foreign shipment. And you must also find, and it is your duty to determine that question, as to whether or not the Government has sustained its burden of proving that these coils were a part of the foreign shipment. [291]

The Government must also prove to your satisfaction beyond a reasonable doubt that the defendant, when taking the coils, if he took them, intended to convert them to his own use.

And then the last question you have to determine is whether or not the Government has proved that the coils were of a value of a hundred dollars or more. There has been evidence produced on the question of value. I don't think that should be a cause of too much difficulty on your part inasmuch as all of the testimony does not appear to me to bring the value down below a hundred dollars, although you may and are at perfect liberty to disregard any of the testimony on the subject of value and still conclude that the value of the coils was less than $100.00.

If you should happen to come to that conclusion that the value of the coils was less than a hundred dollars, that would not prevent you from finding the defendant guilty, if you are satisfied beyond a reasonable doubt of his guilt according to the rules which I have given you; but, in the event that you do find a verdict of guilty and also conclude that the value of the coils was less than a hundred dollars, then in that event you should accompany your verdict of guilt with a finding that the value of the

coils was less than a hundred dollars. I am not indicating to you that you should do that; I am simply pointing out that in the event you should so determine, your verdict should be returned in that manner. [292]

Members of the jury, I think I have given you all the advice that I think can be helpful to you in this matter.

If you can agree upon a verdict, it is your duty to do so, if you can conscientiously reach a verdict.

The defendant in this case is entitled to the independent judgment of each one of you as to his guilt or innocence. You should freely consult with one another in the jury room. If any one of you should be convinced that your view of the case is wrong, you shouldn't be stubborn and you shouldn't hesitate to abandon your view under those circumstances. On the other hand, it is entirely proper to adhere to your viewpoint, whatever it may be, if, after a full exchange of ideas, you still believe that you are right.

The verdict of the jury in this case must be unanimous. You cannot find the defendant either guilty or innocent of this charge unless all of you in the jury room have agreed to the verdict and you should not return with a verdict to the courtroom unless in the jury room all of you have agreed as to the guilt or innocence of the defendant.

When you retire to the jury room to deliberate, you may select one of your number as foreman or forelady, as the case may be, and he or she will preside over your deliberations, will sign your ver-

dict for you when it has been rendered, and will represent you in the further conduct of the case in this court. [293]

We have prepared a form of verdict for you. It is a very simple form. It reads:

> "We, the jury, find Edgar Harold Teague, the defendant at the bar (blank) as charged in the indictment."

In the blank space you will write the words "guilty" or "not guilty" in accordance with the decision which you reach, and your foreman will sign that verdict and that will be the verdict of the jury.

After you have retired to deliberate and have organized and have selected a foreman, if you wish to see any of the exhibits in the case, you may send word through the bailiff and I will see that they are sent to you.

Does either side have any suggestions or corrections or exceptions?

Mr. Petrie: The Government has none, your Honor.

The Court: The defense?

Mr. Roos: No, your Honor.

The Court: Very well. Ladies and gentlemen, you may retire and consider your verdict.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing tran-

script of 288 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ W. A. FOSTER. [294]

The United States District Court, Northern District of California, Southern Division

No. 36232

UNITED STATES OF AMERICA,

vs.

EDGAR HAROLD TEAGUE,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

PROCEEDINGS

October 10, 1958

Appearances:

For the United States:
BERNARD PETRIE, ESQ.

For the Defendant:
LESLIE ROOS, ESQ.

I, Lois Bagley, Official Reporter Pro Tem, certify that the 10 pages of transcript immediately following are a true and correct transcription of the mat-

ter therein contained, as reported by me and thereafter reduced to typewriting, to the best of my ability.

. . . . . .

The Clerk: United States versus Edgar Harold Teague, Motion for New Trial, and for Judgment.

Mr. Roos: May it please the Court, this is a Motion [295] for Judgment of Acquittal under Rule 29, rather than a Motion for New Trial.

Your Honor will recall the motion was made after the jury was discharged, and set over for this morning for argument. The motion is based on the primary ground that no corpus delicti was proven in this case. As your Honor knows, the question of necessity of proving corpus delicti, that a crime has in fact been committed, is a question of substantive law.

This man essentially is charged with theft from the wharf. The proof of any theft, whatsoever, having occurred is entirely lacking. The five coils of copper wire, which were found a day or so after the alleged theft in possession of the defendant—all the witnesses ever said was that this wire was presumed to be wire that was part of the shipment in question. It could have been. A tag was found among the wire, which was acknowledged as being a tag that was part of the shipment. However, it isn't up to the defense to explain how the tag got there.

If your Honor please, five coils of wire were found, which prosecution charges were stolen from

a particular shipment. However, no proof was ever made, and there was no evidence whatsoever that anything was ever stolen from that shipment. 186 coils were tendered to the dock, and 186 coils of wire were taken off at Kobe, Japan. There is absolutely no numerical discrepancy. If we accept the rather incredible testimony [296] as to the weight of these 186 coils when they were checked out of the metal company and supposedly weighed—to say exactly, I forget—20,000 some-odd pounds, right to the thousandths—it is incredible, and the 186 coils did weigh an exact 27,000 pounds, whatever it was. If we accept that weight as accurate, when the 186 coils were weighed in Japan the weight was 499 pounds less; then the shortage was an odd number in San Francisco. So there is a weight discrepancy of 499 pounds. That doesn't prove these coils were stolen from that shipment in this case. Here we have five coils and very strangely two different weights, quite a ways apart, for the five coils. The FBI says they weighed in the Richmond yard 531 pounds. When we had them weighed, your Honor recalls the certified weight was 460 pounds.

It is really immaterial what they weighed, as long as they didn't weigh 499 pounds. Unless they weighed 499 pounds, there is no proof they came from this shipment, even on a theory of weight discrepancy. So there is absolutely no proof that the five coils of wire the defendant is charged with stealing were actually stolen by the defendant or anybody else. To prove corpus delicti, as your Honor knows, they must prove the crime was com-

mitted, must prove something was stolen. They don't have to connect the defendant with the crime, but they have to prove the crime was committed.

Not only is there no proof that theft occurred here, either in number of coils or weight discrepancy, but no one [297] claimed theft. FPA doesn't say somebody stole the wire; the Federated Metal doesn't say somebody stole the wire; the consignee in Japan, the actual purchaser, doesn't say it was stolen—the consignee in Japan hasn't said, "Some of our wire was stolen." Here is an essentially alleged theft with nobody claiming the property was stolen. No complaint witness comes in and says, "Somebody stole my automobile" or "Somebody stole my wire." There is no proof that a crime was committed and no one claiming that a crime was committed, that the property was stolen.

I think, from the evidence and for the reasons set forth, there is complete failure to prove corpus delicti, that a crime was committed, and I move on that ground for Judgment of Acquittal.

The Court: The defendant made a similar motion at the conclusion of the evidence in this case, did he not?

Mr. Petrie: Yes, your Honor.

The Court: And I denied it.

Mr. Petrie: Yes, your Honor.

The Court: Well, I was satisfied at the time, and I see no reason to change that. There was sufficient evidence to go to the jury. I think all that is addressed to the weight of the evidence. One could argue either way on the question you have been

discussing; and the jury found in accordance with the allegations of the indictment.

Mr. Roos: I don't think you can argue either way. [298] The evidence is uncontradicted. It isn't going to the evidence. I am making it as a matter of law.

The Court: The weight of the evidence, which you say is uncontradicted, still was a matter for determination of the jury.

Mr. Roos: To prove a crime, you have to prove a crime was committed.

The Court: I think there was ample evidence, circumstantial, it is true, but that does not tend to lessen the verity of the course of action as to its sufficiency—the fact that the evidence is circumstantial in nature. The argument that you make that there is no corpus delicti because nobody claims the property was stolen——

Mr. Roos: And there is no proof that property was stolen.

The Court: I don't agree——

Mr. Roos: No proof that the property——

The Court: I think there is ample evidence to connect this with the defense. Anybody might decide not to put a claim against the company—there might be a thousand things to cause someone not to make a claim against a carrier——

Mr. Roos: That is not my main argument, your Honor. My main argument is, if there was ample evidence that a crime was committed, there is ample evidence to connect the defendant with it. He had opportunity, as did others, and the property [299]

was established to be in his possession. Yes. But there is no evidence to show the property in his possession was stolen, and particularly stolen from this shipment.

The Court: That argument I don't think has any weight, if I was deciding the question. However, that was still a matter for the jury. The circumstances were such, in my opinion, there was ample evidence to go to the jury, and then it became for the jury to determine.

I will deny the motion, as I did previously, on the motion urged by the defendant on the same grounds.

Mr. Roos, I wonder if you would have the defendant step up.

I have a report from the Probation Officer in this case.

The Defendant: Yes, sir.

The Court: As usual with defendants, detailed information concerning this defendant's background, and all the various matters that are presented in reports of Probation Officers, aid the Court in trying to determine what disposition to make of the case.

The employment record of the defendant, the family record, education, religion, and the fact of military, naval or marine service, and all matters that are important, aid the Judge in determining disposition of the case.

This is the first offense of this man. The [300] amount involved is not great. I would listen with considerable sympathy to an application for pro-

bation were it not for one thing that the Probation Officer mentioned, which is important, so far as the Court is concerned. Probation is for those who are contrite, and those who make full statements concerning the nature of the offense, and those who, with that background or attitude, are amenable to the probation process. That is not true in this case.

I read the defendant's own statement. I might tell you that I received some information—not information, but a plea, as very often happens in cases of offenses, where you get letters written in, statements made by friends or business associates or others—and I received a communication from an important Labor leader, concerning this man; and what he said to me made it clear to me that this is a case where you and the defendant and the Probation Officer should, perhaps, have further discussion concerning this case.

I say to Teague directly and with no equivocation, you better talk to your attorney and to the Probation Officer and, perhaps, to some person high in the circles of the Labor organization, as to whether or not you have done everything that could make it possible for probation in this case. I say to you frankly—I may be wrong—you have not made a contrite statement. I am not suggesting that you say something that is not true in order to evoke aid of the Court, but there are factors about this case that lead me to believe you could make a more accurate statement than the one you made in the report you gave to the Probation Officer concerning your case. Maybe the Court is wrong in the matter.

I don't think I am, but we all can make mistakes. I would listen much more favorably to a request for probation if there were a more complete statement made by the defendant, which would indicate he is amenable to the probation process.

My suggestion goes to the lawyer: If it is worthwhile to give a little further thought to a statement from the defense, do that. And I don't say you have to. There is no force involved. It doesn't make any difference to me. I am here to perform my job. Hundreds and hundreds of cases have gone before and will follow.

I think, therefore, it might be well to continue this matter for judgment for a few days, and you gentlemen give further consideration to what the defendant might do to make himself more amenable to the probation process.

Mr. Roos: May I say this? I don't want—was the information you received in favor or against?

The Court: The information I received was against——

The Defendant: The only detrimental I received was from Mr. Adams, Captain of the Lodge, AFL.

The Court: I am not referring to that. I am referring—it was further in line with the defendant's statement with [302] respect to this offense.

Mr. Roos: May I say in that connection, I discussed that with the defendant many times before and since this trial. I told him if he was guilty of the offense to tell me, and I felt certain the U. S. Attorney might accept a plea to this. He at all times insisted he was not guilty. I said I would not

permit him to plead guilty to something he insisted to me he didn't do. I think the same applies to what Mr. Adams tells me he insisted to him; that he didn't. I told him not to tell Mr. Adams he was guilty of the crime if, in fact, he was not. I don't think——

The Court: Are you going to decide the matter now?

Mr. Roos: No. I just wanted to tell your Honor my position. When you stated I should discuss it, I thought——

The Defendant: May I say something?

The Court: I would rather you don't now. I would rather you talked it over——

The Defendant: Can I say something, sir?

The Court: Well, don't say anything that is going to commit you.

The Defendant: No.

The Court: You are kind of a stubborn fellow. I noticed in some of the reports I got, you—to use the language of the docks—you have somewhat of a reputation of throwing your weight around. Don't throw it around at the present time, [303] when I am trying, if possible, to do something for your own good. This matter can go over, and you can see some of your friends, who must have had some communication from you, because there was a plea made to me in your behalf. So why don't you do that? And see where you want to go from there.

Suppose we continue Judgment—today is Friday—suppose we continue the Judgment until next Wednesday. That will give you time to talk things

over. Maybe something may come from your friends, your lawyer or the Probation Officer, or anyone else; because after the Court—until there has been a finding of guilty, the Court's mind, ears and eyes should be open to anything, any information, that is helpful to the Court in disposing of the case.

Will that be all right? Wednesday morning?

Mr. Roos: I think so.

The Court: We will continue the matter until that time. [304]

October 15, 1958—10:00 o'Clock A.M.

The Court: I continued this matter for judgment last Friday until today. Is there anything further that the Probation Officer or counsel wish to report?

Probation Officer: Your Honor, apparently there is no change in his attitude.

The Court: Is there anything further you wish to say?

Mr. Roos: The defendant followed your Honor's suggestion, made to me in chambers last Friday, and it is my understanding that—I don't know, I wasn't present at the conference—it is my understanding from Mr. Teague that there is no change in his position regarding the offense, and he told me, and I told him I agreed with him, he should not say he was guilty of something he was not guilty of, and the only person who really knows is Mr. Teague.

The Court: I think the Court made quite clear

at the last hearing the reason for suggesting a continuance in this matter.

Under the circumstances, I don't feel that this is a proper case for probation. The defendant's attitude is not one that is conducive to the granting of probation, nor does it demonstrate the ability to live up to the terms of probation.

Under the circumstances, the Court will impose judgment in this case, and I will do so under the provisions of Public [305] Law 85, approved by the president on August 23rd, 1958, known as 72 Statute 834, which gives the Court the power to split the judgment and suspend a part of the sentence in a one-count indictment. This statute provides for a maximum penalty of $5,000 fine and/or ten years in prison.

It will be the judgment of the Court that the defendant pay a fine in the sum of $1,000, and I will sentence him to one year in prison and suspend eleven months of the sentence and place him on probation for the remaining eleven months of the sentence. That means that the defendant will pay a fine of $1,000 and serve 30 days in jail, and then he will be on probation for the remaining eleven months of the sentence.

Mr. Roos: Would your Honor, at this time, consider making an order fixing bail pending appeal?

The Court: Well, you can make an application. Do you wish to make it now?

Mr. Roos: Yes, your Honor; I am making it now.

The Court: Offhand, Mr. Roos, I think there

was nothing but a factual question involved in this case, and I don't believe I could certify to the fact that this would be a good-faith appeal.

Mr. Roos: I think it is certainly a good-faith appeal, your Honor, on the ground, particularly, of two grounds that I can think of offhand, the one that I argued for a directed verdict of acquittal, that there was legally no corpus delicti [306] proved in this case; and, secondly, on what I contended was error in admitting the weighmaster's certificate in Japan, which was hearsay and no foundation was laid for its admittance, and without that weighmaster's certificate in Japan, there could have been no proof any weight discrepancy in this material.

As I understand the law now, since the amendment to the rules, the only finding necessary to be made on the question is that the appeal is not for purposes of delay or bad faith, and I assure you that that is not the case.

The Court: Well, Mr. Roos, I assume you are asking for bail on appeal because you intend to file notice of appeal?

Mr. Roos: Yes, sir.

The Court: If you do file notice of appeal, you have now applied for bail, I will deny the application for bail on appeal, but I will grant a stay of five days so that you may make your application to the Court of Appeals.

[Endorsed]: Filed November 19, 1958, U.S.D.C.

[Endorsed]: Filed December 4, 1958, U.S.C.A.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorney for the appellant:

Indictment.

Minute Order—Arraignment.

Minute Order—Plea.

Minute Order—Motion for Production of Documents and Suppression of Evidence.

Minute Order—Trial.

Minute Order—Trial.

Minute Order—Trial, Verdict of Guilty, Motion for Judgment of Acquittal or in Alternative for a New Trial.

Minute Order Denying Motion for Judgment of Acquittal.

Verdict.

Judgment and Commitment.

Minute Order—Sentence.

Notice of Appeal.

Designation of Record on Appeal.

Counter-Designation of Record on Appeal.

U. S. Exhibits 1, 2, 3, 4, 5, 6, 7-A, 7-B, 8, 9, 10.

Defendant's Exhibits A, C, D, E, F, G, H, I, J, K, L.

Reporter's Transcripts (2 volumes).

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 4th day of December, 1958.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ J. P. WELSH,
Deputy Clerk.

[Endorsed]: No. 16270. United States Court of Appeals for the Ninth Circuit. Edgar Harold Teague, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: December 4, 1958.

Docketed: December 8, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16270

EDGAR HAROLD TEAGUE,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

ORDER

On Motions for Admission to Bail, and for Stay of Payment of Fine, Pending Appeal

Before: Popé, Hamley, and Hamlin,
Circuit Judges.

Appellant may be admitted to bail pending disposition of the appeal upon filing in the registry of the United States District Court for the Northern District of California an appearance bond in the sum of One Thousand Dollars ($1,000), approved as to form and execution by a judge of that court.

That portion of the judgment and sentence under review directing payment of a fine of One Thousand Dollars is stayed pending disposition of this appeal.

/s/ WALTER L. POPE,
Circuit Judge;

/s/ FREDERICK G. HAMLEY,
Circuit Judge;

/s/ O. D. HAMLIN,
Circuit Judge.

[Endorsed]: Filed October 20, 1958.

[Title of Court of Appeals and Cause.]

POINTS UPON WHICH DEFENDANT-APPELLANT INTENDS TO RELY

1. Insufficiency of the evidence to justify the verdict.

2. Insufficiency of the evidence to prove the corpus delicti.

3. Erroneous admission into evidence of plaintiff's Exhibit No. 8 over objections of the defendant.

4. Erroneous denials of defendant's motions for a judgment of acquittal at (a) the close of plaintiff's case, (b) the close of the evidence, and (c) after discharge of the jury (Rule 29, Rules of Criminal Procedure).

5. Improper argument to the jury by the Assistant United States Attorney.

/s/ LESLIE L. ROOS,

ROOS, JENNINGS & HAID,
Attorneys for Defendant-Appellant.

Receipt of copy acknowledged.
[Endorsed]: Filed December 9, 1958.

[Title of Court of Appeals and Cause.]

SUPPLEMENTAL STATEMENT OF POINTS UPON WHICH DEFENDANT-APPELLANT INTENDS TO RELY

6. Erroneous admission into evidence of conversations between defendant and Robert G. Barthol over objections of the defendant.

/s/ LESLIE L. ROOS,

ROOS, JENNINGS & HAID,
Attorneys for Defendant-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed December 16, 1958.

No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees.

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants.

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

OPENING BRIEF OF APPELLANT AUTHORIZED SUPPLY COMPANY.

MAY, LESHER & DEES,
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Tucson, Arizona,
Attorneys for Appellant Authorized Supply Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
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ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants.

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

OPENING BRIEF OF APPELLANT AUTHORIZED SUPPLY COMPANY.

Basis of Federal Jurisdiction.

Plaintiff in its complaint against defendant alleged itself to be a corporation incorporated in Illinois and defendant to be a corporation incorporated in Arizona. The jurisdiction of the Court was based upon this diversity of citizenship, and the matter in controversy, exclusive of interest and costs, exceeded the $3,000 that was prerequisite to Federal jurisdiction at the time the complaint was filed. The jurisdiction of the Court was based upon the provisions of Title 28, United States Code, Section 1332.

Statement of the Case.

References to the transcript of Record are indicated as [Tr. .....].

In May, 1955, plaintiff contracted with defendant Arizona York Refrigeration Co. to install certain refrigeration equipment in plaintiff's building in Tucson, Arizona. The installation required, among other things, two refrigeration coils. Arizona York Refrigeration Co. suggested to plaintiff the use of coils made by Bush Manufacturing Co., a Connecticut corporation [Tr. 152]. Arizona York Refrigeration Co. ordered the two coils from the Third-Party Defendant, Authorized Supply Co., the Arizona distributor for Bush products [Tr. 155], ordering the units from the description thereof contained in a catalogue of Bush products which Arizona York Refrigeration Co. had in its possession [Tr. 156]. The coils were thereupon shipped to the defendant Arizona York Refrigeration Co. direct from the Bush factory in Connecticut, and were billed by the factory to Arizona York Refrigeration Co. through Authorized Supply Co. The coils were installed by defendant in plaintiff's building. Thereafter, in December, 1955, one of the coils developed a leak which permitted ammonia gas to escape into plaintiff's storage area, causing the damage to the meat and other products stored there by plaintiff that was the basis for this action.

After the leak had been discovered, the defendant Arizona York Refrigeration Co. (or Southern Arizona York Refrigeration Co., its successor) returned the defective coil to Bush and received in its place from Bush, a new coil unit free of charge [Tr. 167, 170 and 180]. That

replacement unit was thereupon installed in plaintiff's warehouse, and plaintiff was credited with the price of the defective unit (*i.e.,* it received the replacement free). [Tr. 170, 180].

Thereafter, plaintiff brought its action against Arizona York Refrigeration Co. and Southern Arizona York Refrigeration Co., alleging negligence and breach of warranty and seeking as damages the value of the products spoiled by the ammonia gas leaked by the defective unit. The defendants joined Authorized Supply Company as Third-Party defendant, alleging negligence and breach of warranty of fitness implied under Arizona law. All negligence counts were dropped on trial, and both plaintiff and defendants proceeded solely on the theory of breach of warranty.

At the conclusion of Third-Party Plaintiff's case, Third-Party Defendant moved the Court for judgment on the Third-Party Complaint, on the ground that the evidence conclusively established that the defendants and Third-Party Complainants had, in returning the defective coil and accepting a replacement, made a pre-litigation election of remedies that foreclosed their right to recover over against Third-Party Defendant in this action. The motion was denied. Judgment was entered in favor of plaintiff on its Complaint, and in favor of defendants on their Third-Party Complaint against this appellant, Authorized Supply Co.

This appeal was taken from the Court's Findings and fact, Conclusions of Law and judgment against Third-Party Defendant, Authorized Supply Co.

Specifications of Error.

One.

The trial court erred in making Finding of Fact No. 11, in that it is on an immaterial matter. The intention of the parties not to rescind the contract for the purchase of the defective coil was not a proper issue in this case.

Two.

The trial court erred in drawing Conclusion of Law No. 5, for the reason that the facts found by the court established a binding election of remedies as a matter of law.

Three.

The trial court erred in drawing Conclusion of Law No. 7, for the reason that the Third-Party Plaintiff had bindingly elected its remedy and could have no judgment against Third-Party Defendant (this appellant) in this action.

Four.

The trial court erred in denying the Thiry-Party Defendant's Motion for Judgment at the close of Third-Party Plaintiff's case, for the same reasons assigned in the foregoing specifications of error.

Five.

The trial court erred in entering judgment against this appellant (Third Party-Defendant) on the Third Party Complaint, for the reasons assigned in Specifications of Error Nos. One, Two and Three.

ARGUMENT.

This appellant's position may be briefly summarized as follows:

The sale by it to appellee and Third-Party plaintiff Southern Arizona York Refrigeration Company was made in Arizona and covered by the provisions of the Uniform Sales Act as enacted in that state. That Act (Arizona Revised Statutes, Pars. 44-201 *et seq.*) provides, among other things, that an implied warranty of "fitness" and/or "merchantable quality" shall accompany the sale. It sets out the buyer's remedies for breach of that warranty (Par. 44-269). It makes the various remedies exclusive each of the others and provides that an election of any shall bar the others. One of those remedies is return of the goods and restoration of the purchase price. When Southern Arizona York Refrigeration Company returned the defective coil to Bush and Co., in Connecticut, and was provided, free, with a new unit, being credited with the full amount of the purchace price of the defective unit, it made a binding election of remedies which, under the Arizona Statute, precluded its action against Authorized Supply Company for damages resulting from the breach of warranty.

The judgment against this appellant arises out of a breach of implied warranty of fitness of a product sold by it to appellee Southern York Refrigeration Company. The implied warranty arises by virtue of Section 44-215 of the Arizona Revised Statutes, 1956. Section 44-269 (Sec. 69 of the Uniform Sales Act) reads, in applicable part, as follows:

> "A. Where there is a breach of warranty by the seller, the buyer may, at his election:
>
> 1. Accept . . . the goods and set up . . . the breach of warranty by way of recoupment. . . ."

2. Accept or keep the goods and maintain an action against the seller for damages for breach of warranty.

3. . . .

4. Rescind the contract to sell or the sale and . . . if the goods have already been received, return them or offer to return them to the seller and recover the price of any part thereof which has been paid.

B. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

It is this appellant's position that appellee Southern Arizona York Refrigeration Company, by returning the defective coil and being credited with its price, had "claimed and been granted a remedy", and that "no other remedy (i.e., by action for damages) can thereafter be granted".

The remedies provided by Section 44-269 are mutually exclusive. In *Yancy v. Jeffreys* (1932), 39 Ariz. 563, 8 P. 2d 774, the Arizona Supreme Court held:

> "This transaction presents a purchase and sale. The general rule of law is that, in case the terms of the sale are breached by the seller, the buyer has several remedies among which he may choose. He may either (a) affirm the sale, notwithstanding the breach, and carry out his part of the agreement; (b) rescind the sale, returning the property and recovering anything already paid on the purchase price; (c) affirm the sale, and, if he has been damaged by the breach of the contract by the seller, set off the amount of damage on a suit by the seller for the balance of the purchase price; or (d) sue the seller for damages. 55 C. J. 1072. He must, however, elect between these remedies, and is bound by his election."

The quotation set forth above was set out verbatim in *California Steel Products v. Wadlow* (1941), 58 Ariz. 69, 118 P. 2d 67, as being the law of Arizona, the Court therein further saying:

> "The sales statute provides that when a buyer has claimed and has been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

Williston holds this to be the general rule, and in 3 "Williston on Sales", p. 362 *et seq.,* lists twenty-four cases supporting it. In his 1957 supplement to the treatise, the Section (Par. 162) is still headed "The Buyer's Remedies Are Mutually Exclusive", and eight new cases are added in support of that conclusion.

When the defective article has been returned to the seller, and the purchase price repaid by cash, credit, replacement or otherwise, there has been a rescission of the contract as a matter of law.

> "Return of the subject matter . . . will deprive the buyer of any right thereafter to sue for damages." 46 Am. Jur. "Sales" Par. 727 (citing cases and stating that the Uniform Sales Act specifically so provides).

And, from C. J. S.:

> "The buyer may not pursue both remedies (under the Act). Hence, if he has returned the goods and received back what he paid, he cannot sue for a breach of warranty." 77 C. J. S. "Sales" Par. 355, p. 1263 *et seq.*

The following is but a partial list of the many cases which have announced this principle:

Stanley Drug Co. v. Smith Laboratories, 313 Pa. 368, 170 Atl. 274;

Henry v. Rudge, 118 Neb. 260, 224 N. W. 294;

Boviard Mfg. Co. v. Martland, 92 Ohio St. 210, 110 N. E. 749;

Campbell Music Co. v. Singer (D. C. App.), 97 A. 2d 340;

Simmons v. Brooks (D. C. App.), 66 A. 2d 517;

Gatch v. Sears, Roebuck & Co. (U. S. D. C., S. C.), 143 Fed. Supp. 937;

Powers v. Rosenbloom, 143 Me. 361, 62 A. 2d 531;

Claybourn Corp. v. Arneo Press (U. S. D. C., N. D. Ill.), 27 Fed. Supp. 231;

Taber v. Rauch (C. C. A. 5), 22 F. 2d 680;

Arctic Engr. Co. v. Wilson, 272 Wis. 129, 74 N. W. 2d 627;

Willeke v. Neunschwander, 55 Ohio App. 527, 9 N. E. 2d 1018;

Moskowitz v. Flock, 112 Pa. 518, 171 Atl. 400;

Somerton v. International Harvester, 56 Ga. App. 655, 193 S. E. 476;

United Engine Co. v. Junius, 196 Iowa 914, 195 N. W. 606;

Yancey v. Southern Lumber Co., 133 S. C. 369, 131 S. E. 32;

King v. Guy (Mo. App.), 297 S. W. 2d 617;

Lone Star Olds Cadillac Co. v. Vinson (Tex. Civ. App.), 168 S. W. 2d 673;

Nickerson v. Whalen (Mo. App.), 253 S. W. 2d 502.

In *Henry v. Rudge & Guenzel Co.,* 118 Neb. 260, 224 N. W. 294, the Supreme Court of Nebraska, applying Section 69 of the Uniform Act to facts similar to those at bar, said, citing five other Nebraska cases so holding:

> "But, assuming there was a warranty, the plaintiff's testimony shows clearly that the sale was rescinded. She returned the shoes and was fully repaid the purchase price and it was done at her request and voluntarily. Counsel urge that she did not intend to rescind, and that the statement that she would see the defendants later about her injuries indicated that she was not consenting to a rescission. There is no such thing as a partial rescission, except in certain cases where the contract is divisible. Where the sale is for a particular article there can be no partial rescission. After the return of the shoes and the repayment to her of the purchase price, the rescission was complete. In *Apex Chemical Co. v. Compson,* 171 NYS 60, the court held that rescission seems to follow as a matter of law the return of the property, and that the return itself operates as a conclusive presumption of law that the plaintiff intended to rescind. When plaintiff returned the shoes and received payment for the purchase price, it was an irrevocable election to rescind, and her statements to the effect that she would see the defendants later about her injuries was ineffectual to modify or disaffirm her election to rescind.
>
> "Having rescinded the contract, the plaintiff has no right of action for damages for breach of the warranty."

And in *Taber v. Rauch* (C. C. A. 5), 22 F. 2d 681, the court said:

> "Taber had a choice of remedies. He could sue for rescission, or for damages for a breach of warranty;

but he could not take back the consideration, return the pearls, and maintain a suit for breach of warranty. These remedies are inconsistent, and exclusive of each other. *Wilson v. New United States Cattle Ranch Co.,* 73 F. 994; 24 RCL 235; 13 CJ 611; Williston on Contracts, Par. 1464; Williston on Sales, Par. 612."

In *Gatch v. Sears, Roebuck & Co.,* 143 Fed. Supp. 937, the court said:

"He (the buyer) cannot pursue both of these remedies, and an election to pursue one is a waiver of the right to pursue the other. . . . There cannot be a rescission by the buyer coupled with a recovery for damages by reason of an alleged breach of contract."

In addition to the cases cited above, Volume 40 of McKinney's New York Law (Personal Property), at page 825, lists twelve cases in New York alone which, prior to 1948, supported that proposition.

If further indication of the necessary meaning and effect of A. R. S. Par. 44-269 were needed, the history of the Uniform Sales Act in New York would provide it. Prior to 1948, the New York version of the Uniform Sales Act read exactly as our present Section 44-269. This same question of election of remedies came very often before the courts of that state. The decisions followed the general rule: That to return the goods is to rescind; to rescind is to elect the remedy; to elect the remedy is to bar a subsequent suit for damages. See: *Bennett v. Piscitello,* 9 N. Y. S. 269, and the numerous cases listed in "McKinney's Personal Property Law", Vol. 40 of McKinney's New York Laws, pp. 825-826. The 1948 New York Legislature was then called upon to consider changing what was recognized to be a harsh rule. An amendment to that Section of the Uniform Act which is our Section

44-269 was proposed, in which the fourth alternative remedy (Sec. 44-269(A)4) was amended to read:

> "D. Rescind the contract . . . or return the goods and recover the purchase price . . . *and damages recoverable in an action for breach of warranty to the extent . . . not compensated by recovery of the purchase price or discharge of the . . . obligation to pay the same;* (emphasis supplied)."

The committee of the Legislature studying and reporting on the proposed amendment said of it:

> "Its purpose is to enable a buyer who rescinds for breach of warranty to recover not only the price but also damages for the breach. . . ."
>
> New York Legislative Docket 65(F); 1948 Reports, Recommendations and Studies.

After passage of the amendment in 1948, cases from that jurisdiction ceased to be authority in Arizona, which retains the unamended version of the Uniform Sales Act.

It is important to be borne in mind that every one of the cases cited above was decided under either the exact statutory language being considered here or under the rule of the common law, which was the same rule. (See the annotator's comment at 157 A. L. R. 1078.) There can be no substantial question that it is the widespread, general rule under the Uniform Sales Act that where a buyer has returned defective merchandise for replacement or credit, he is foreclosed from suing thereafter for consequential damages for breach of warranty. Among only those jurisdictions from which cases have been cited above, eight, Nebraska, Ohio, the District of Columbia, Illinois, Wisconsin, Iowa and Alabama, and until 1948, New York, have adopted this section of the Uniform Sales Act exactly as it exists in the Arizona Statutes. The purpose of the Act is to establish uniformity.

> "This chapter shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it."
>
> 1956 Ariz. Rev. Stats., Sec. 44-274.

In the Superior Court case of *Roberts v. J. C. Penney Co.,* Superior Court of Maricopa County, No. 76505 (1954), the plaintiff purchased a pair of shoes from defendant. Three or four days later, she noticed a defect in them. She returned them to defendant, which replaced them with a new pair. Plaintiff thereafter brought an action for breach of an implied warranty under the Uniform Sales Act, alleging that the defect had caused injury to her feet. A motion by the defendant for summary judgment under the then Section 52-578, A. C. A., 1939 (now A. R. S., Sec. 44-269), was granted, the Court's written opinion saying:

> "It is the court's opinion that . . . a buyer cannot rescind and at the same time retain his rights to sue for special damages under the provisions of (The Act). Whether or not this be a harsh and unjust rule is for legislative determination and not for judicial determination under the and in contravention of the plain language of the statute."

It is submitted that the Arizona statute is unambiguous and the cases construing that state clear. When the defendant here returned the original coils to Authorized Supply for credit on new ones, it made a binding and conclusive election of remedies which bars the action which by the Third-Party Complaint it now seeks to bring.

Respectfully submitted,

May, Lesher & Dees,

Attorneys for Appellant Authorized Supply Company.

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No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees,

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants,

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

APPELLANTS' ARIZONA YORK REFRIGERATION COMPANY AND SOUTHERN ARIZONA YORK REFRIGERATION COMPANY'S OPENING BRIEF

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APPELLANTS' ARIZONA YORK REFRIGERATION COMPANY AND SOUTHERN ARIZONA YORK REFRIGERATION COMPANY'S OPENING BRIEF

BASIS OF FEDERAL JURISDICTION

In its initial and Amended Complaint, plaintiff alleged it was a corporation incorporated under the laws of the State of Illinois, the defendants were domestic corporations incorporated under the laws of Arizona, and that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.00 (Transcript of Record, page 3). These facts vested jurisdiction in the United States District Court in Arizona as of the date the initial Complaint was filed, to-wit, October 19, 1956, in accordance with the provisions of Title 28, United States Code, Section 1332. Title 28, United States Code, Section 1291, confers appellate jurisdiction upon the Court of Appeals.

STATEMENT OF THE CASE

Hereinafter, references to the Transcript of Record are indicated as (T.R._____). For clarification purposes the parties to the within appeal shall generally be hereinafter designated as they were in the trial court, to-wit, Swift and Company, "Plaintiff", Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, "Defendants", or "Defendants York", and Authorized Supply Company of Arizona, "Third-Party Defendant".

This appeal, combined with the appeal of Authorized Supply Company of Arizona, is from the Findings of Fact and Conclusions of Law (T.R. 28) and Judgment (T.R. 36) of the District Court of the United States for the District of Arizona, dated September 18, 1958. By virtue of the Findings of Fact and Conclusions of Law and the Judgment, it was determined that plaintiff was entitled to recover from defendants the sum of $9,175.29, and costs. Defendant Southern Arizona York Refrigeration Company

was granted a judgment over against third-party defendant in the same amount. The filing of an appeal to this Court by third-party defendant has necessitated a concurrent appeal by defendants York.

The case arose as a result of ammonia damage, primarily to meat products of plaintiff, occurring on December 4 or 5, 1955 (T.R. 54) caused by defects in Bush refrigeration coils sold to plaintiff by defendant Arizona York Refrigeration Company pursuant to contract of May 31, 1955 (T.R. 159, 50). Defendant Arizona York Refrigeration Company had purchased the coils from third-party defendant (T.R. 155). It was uncontradicted that the sole cause of the damage to plaintiff's property was a manufacturer's defect in the Bush coils (T.R. 114, 132, 137 and 143).

Subsequent to the damage to plaintiff's products, the defective coils were returned by plaintiff to defendant Southern Arizona York Refrigeration Company (the successor to Arizona York Refrigeration Company, T.R. 160ff., 172ff., 31), and by the latter to Bush Manufacturing Company through third-party defendant (T.R. 166, 171 and 180). Replacement units supplied through third-party defendant (T.R. 171) were installed by defendant Southern Arizona York Refrigeration Company at plaintiff's plant without cost to it (T.R. 167, 170 and 180).

Suit was filed by plaintiff against defendants for damages for breach of express and implied warranties and negligence, and defendants joined Authorized Supply Company of Arizona as a third-party defendant, alleging breach of warranties and negligence. The negligence count against defendants was dismissed at the trial (T.R. 115), and by agreement de-

fendants' claim of negligence against third-party defendant was dropped.

Defendants' contentions at trial were primarily two-fold:

1. No warranties, express or implied, ran from them to plaintiff affording it protection for consequential damages, including loss of profits arising from the ammonia leakage, same not being within the reasonable contemplation of the parties, and that the only express warranties were as to parts and labor, in effect a replacement warranty.

2. Plaintiff's cause of action for damages for breach of warranties was irrevocably lost by its election of the remedy of rescission, to-wit, the return of the defective coils and their replacement with new coils without cost to the plaintiff.

SPECIFICATION OF ERRORS

1. The trial court erred in entering its Finding of Fact No. 7, that plaintiff and defendant Arizona York Refrigeration Company understood and contemplated that if the refrigeration system failed to operate efficiently and properly, loss and damage to meat products stored in plaintiff's plant would be the natural and probable consequence of the failure of such system, for the reason that the record is devoid of any evidence or testimony to establish such an intention, and said Finding is contrary to the evidence.

2. The trial court erred in entering its Finding of Fact No. 11, that neither plaintiff nor defendant Southern Arizona York Refrigeration Company intended, by the substitution of new Bush coils for the defective ones, to effect a rescission of any of the

agreements between them, for the reason that said Finding is not supported by and is contrary to the evidence in the action, and said Finding is immaterial, said substitution constituting a binding election of remedies as a matter of law.

3. The trial court erred in entering its Conclusion of Law No. 5, that in permitting the substitution of the new Bush coils plaintiff did not elect a remedy for its loss, for the reason that the evidence and the Findings of Fact entered by the Court, in particular Nos. 6, 8, 9 and 10, established a binding election of remedies as a matter of law.

4. The trial court erred in entering its Conclusion of Law No. 6, for the reasons that (a) by virtue of the substitution of new Bush coils plaintiff had made a binding election of remedies, and was precluded from recovering a judgment for damages against defendants, and (b) plaintiff was not entitled to recover any consequential damages from defendants, same not being within the contemplation of the said parties.

5. The trial court erred in denying defendants' motions for judgment made at the close of plaintiff's case and at the close of all the evidence for the same reasons assigned in Specifications Nos. 1 through 4 above.

6. The trial court erred in entering judgment against defendants for the same reasons assigned in Specifications Nos. 1 through 4 above.

ARGUMENT

THEORY OF THE CASE

The pleadings and the evidence at trial establish that the plaintiff sought recovery against the defend-

ants only on the theory of breach of express and implied warranties. The Amended Complaint asks damages for breach of warranties only as to "defective equipment" sold, to-wit, the Bush coils. Other than the dismissed negligence count, no other cause of action was stated, or attempted to be stated. All parties agree that the case is necessarily one falling within the confines of the Uniform Sales Act, Arizona Revised Statutes, Sections 44-201, et seq. The remedies sought by plaintiff, in particular the remedies for alleged breach of implied warranties, arose from the provisions of these statutes.

As admitted by the nature of plaintiff's action, the contract between Swift and Company and defendant Arizona York Refrigeration Company was a contract for sale of goods, not one for labor and materials. The Sixth Circuit has held that a contract for the installation of a refrigeration system in a slaughter house was one for the sale of goods rather than for labor and materials, and that the contract was within the implied warranty provisions of the Michigan Sales Act. *Burge Ice Machine Co. vs. Weiss,* 219 F.2d 573. The Court cited *Cox-James Co. vs. Haskelite Mfg. Co.,* 255 Mich. 192, 237 N.W. 548, holding that a contract for a waste conveyor system to perform a certain function was a sale within the Uniform Sales Act. It was held in *Service Conveyor Co. vs. Shatterproof Glass Corp.,* 219 F.2d 583, that a contract for the installation of a conveyor system in defendants' plant was one for the sale of goods rather than one for labor and materials, and, therefore, falls within the provisions of the Uniform Sales Act.

That work or labor is to be done on or in connection with the materials sold as an incident to, or in connection with, transfer of title to the material, does

not rob the transaction of its essential characteristics of a "sale" if the whole or any measurable part of the consideration for the performance of the contract is compensation for the material. *Fifteenth Street Inv. Co. vs. People,* 102 Col. 571, 81 P.2d 764. This case applies the rule to a contract to furnish, erect and install an elevator to specifications.

CONSEQUENTIAL DAMAGES

The judgment against defendants York is based upon plaintiff's contentions that said defendants breached express and implied warranties of fitness of the refrigeration system and its component parts sold under the contract of May 31, 1955. The specific language of the contract upon which the express warranty is predicated is contained in the trial court's Finding of Fact No. 5 (T.R. 29). The implied warranty relied on is based upon the language of Section 44-215 of the Arizona Revised Statutes.

Defendants submit that none of the language of the contract of May 31, 1955, (see plaintiff's exhibits 1 and 10) constitutes any more than a warranty or guaranty of parts and labor. All that was given to the plaintiff by the written contract and specifications was a replacement warranty; and in sense and reason that is all that could have been intended.

It is generally recognized that consequential damage from a breach of either or both express and implied warranties, is only recoverable when same might reasonably be supposed to have been contemplated or foreseen by the parties at the time the warranty was made as the probable result of the breach. See 46 Am.Jur., Sales, Section 741. Thus, A.R.S. Section 44-269G provides that normally the measure of damages is the difference between the value of the goods

sold at the time of delivery and the value they would have had if they answered to the warranty.

It is submitted that nothing in the contract between the parties shows any intention that the seller, Arizona York Refrigeration Company, should be liable to Swift and Company for consequential damages. It is not unreasonable to conclude that no such warranty was or could be intended, both parties knowing that the seller was not the manufacturer of the items sold. The burden of proof to establish an intention of the parties that consequential damages should also be covered rests upon the plaintiff. No such proof was offered at trial.

It should also be kept in mind that the coils in question were installed in a freezer room, and their sole purpose was to cool that room. Yet a substantial portion of the damages claimed occurred in a storage area outside the freezer room (T.R. 92 and 93), because the door to said room (with which the defendants had no connection whatever) came open, apparently because of a defective latch or improper adjustment, (T.R. 63ff., 90). It is unreasonable to presume any intention by defendant Arizona York Refrigeration Company (or any seller in a similar position) to accept almost absolute and unlimited liability for damages which might result from defective coils manufactured by another.

The authorities recognize that loss of profits is not recoverable unless same may reasonably be presumed to have been within the contemplation of the parties at the time when any warranties were made. See 46 Am.Jur. Sales, Section 743. There was no evidence whatever that it was contemplated by the parties to

the original contract that possible loss of profits from prospective sales of meat would be recoverable in the event of equipment failure. There is a necessary and reasonable limitation to the doctrine of foreseeability. Defendants York believe that reasonable men would not expect a seller of refrigeration equipment manufactured by another, to assume unlimited liability for unforeseeable failures in the subject of the sale. Would it be reasonable to hold the seller of similar equipment liable for all the damage done by fire in a five block business area, for example, if the fire was caused by a short circuit in a defective motor supplied by a third party? In circumstances such as these, any loss of profits is the remote, rather than the natural and proximate consequence of any breach of warranty. See 15 Am.Jur., Damages, Sections 151, 151 and 153.

Furthermore, plaintiff wholly failed to prove the necessary elements of its claim for damages for loss of profits, as it was unable to prove the cost to the Swift and Company unit, of any items for which it seeks recovery, (T.R. 87). There was no competent evidence from which any loss of profits could be computed with reasonable certainty.

CONCLUSIVE ELECTION OF REMEDIES

Appellants' York's argument on this point will necessarily parallel the argument of appellant Authorized Supply Company of Arizona, as the positions of said parties on this issue were essentially the same at the trial. So far as possible, these appellants will attempt to avoid expected and unnecessary duplication.

Plaintiff's cause of action for damages for breach of warranties was irrevocably lost by its election of the remedy of rescission, afforded it by A.R.S.

Section 44-269, (Section 69 of the Uniform Sales Act), subsection A 4. Subsection A provides:

> "Where there is a breach of warranty by the seller, the buyer may, at his election:
>
> 1. Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.
>
> 2. Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.
>
> 3. Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty.
>
> 4. Rescind the contract to sell or the sale and refuse to receive the goods or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which had been paid."

The evidence is uncontradicted that the defective coils were voluntarily returned by plaintiff Swift and Company to defendant Southern Arizona York Refrigeration Company and new coils were accepted by plaintiff in replacement without cost to it, (T.R. 166, 167, 170 and 180). As a matter of law these facts constituted a rescission and a binding election of remedies, and any intention of the parties to the contrary was wholly immaterial.

The applicable statute is unambiguous, and not subject to interpretation: "When the buyer has claimed and been granted a remedy in any one of these

ways, no other remedy can thereafter be granted." A.R.S. Section 44-269B.

The Arizona cases of *Yancy vs. Jeffreys,* 39 Ariz. 563, 8 P.2d 774, and *California Steel Products vs. Wadlow,* 58 Ariz. 69, 118 P.2d 67, pronounce the law in Arizona as to election of remedies, and the rule there announced that the remedies provided (A.R.S. Section 44-269) are mutually exclusive remains in full force and effect. In the *Yancy* case, after setting forth the alternative remedies which the buyer has in case of a breach by the seller, the Court said "He must, however, elect between these remedies, and is bound by his election". The *Wadlow* decision quoted from the earlier *Yancy* case, and went on to say, citing the predecessor Arizona statute, "The sales statute provides that when a buyer has claimed and been granted the remedy in any one of these ways, no other remedy can thereafter be granted". The overwhelming weight of authority would apply the election of remedies rule to the facts of this case. It is to be kept in mind that Section 69 of the Uniform Sales Act (A.R.S. Section 44-269) applies to both express and implied warranties.

The legal textbooks have no difficulty in recognizing and accepting the principle that the return of defective goods, and recovery of the purchase price (or the substitution of replacement goods) bars an action for damages caused by the defect. See 77 C.J.S., Sales, Section 355 (it is worth noting that this authority, at page 1265, cites the several cases reaching a different conclusion, including *Russo vs. Hochschild Kohn and Co.,* 184 Md. 462, 41 A.2d 600, 157 A.L.R. 1070, under a text reference to *an amendment* to Section 69 of the Uniform Sales Act, adding to the remedy

of rescission the right to bring action for damages resulting from the breach); 46 Am.Jur., Sales, Section 727; and 3 Williston on Sales, Section 612 p. 362 and Supplement. Nor have the courts had any difficulty with a proper interpretation of the election of remedies provision of the Sales Act and the exclusiveness of the remedy chosen, until, apparently, the *Russo* case was decided in 1945. As the annotation in 157 A.L.R., beginning at page 1077, points out, the *Russo* case "* * * appears to be the first, among the many on the subject in general, to hold that Section 70 of the * * * Uniform Sales Act * * * operates to except claims for special damages from the express provisions of Section 69 * * * ". It is submitted that the annotation makes it very clear that the *Russo* case and its rationale are unique and out of step with the accepted and reasoned doctrine. It should be noted that the judges in the *Russo* case could not wholly decide whether to base the decision upon Section 70 or the claimed intention of the parties as to rescission (see the concurring opinion). Both the majority and the concurring opinions make a pointed reference to the negligible value of the $1.50 hair lacquer pads involved. These factors should be considered, in light of the transparent effort of the judges to do "justice" at the expense of recognized law. Defendants submit that both the reliance on Section 70 by the majority, and the "intent of the parties" by the concurring judges was "make-weight" pure and simple to avoid the effect of what they considered the harshness of the inescapable meaning and intent of Section 69.

Section 70 (A.R.S. Section 44-270) is as integral a part of the original Uniform Sales Act as it was adopted in the states as Section 69 (A.R.S. Section 44-269). It is submitted that Section 70 has nothing

whatever to do with the subject matter of Section 69. On the contrary, Section 70 only has reference insofar as "special damages" are concerned to those situations or cases where *"special damages" have always been recognized as recoverable,* just as "interest" has been recoverable. The key to Section 70 is the language, "* * * where, by law, interest or special damages may be recoverable." If any of the dozens of legislatures which have enacted the Uniform Sales Act had intended the result reached in the *Russo* case and its few fellow cases, Section 69, subsection A 4 and/or B, would have been written in such a fashion as to clearly so provide.

The New York Legislature in 1948 felt it necessary to amend Section 69 of its sales act to permit the double remedy, notwithstanding the fact that the Maryland Court had decided the *Russo* case three years before. No such amendment has been enacted in Arizona.

The Court's attention is directed to *Bennett vs. Piscitello,* 170 Misc. 177, 9 N.Y.S.2d 69. At page 77 of the latter volume, a clear analysis, admittedly by a "lower" court, of the proper interpretation of Section 69 of the Uniform Sales Act is found, the Court rejecting the conclusion reached in *Waldman Produce vs. Frigidaire Corp.,* 284 N.Y.S. 167, saying:

> "A remedy in law, is a privilege to do, coupled with the right to demand. When the remedy is statutory, and is clearly and unequivocally expressed, the Court in applying it may neither subtract from its requirements nor add to its awards. It may construe and apply. It may not enlarge, no matter how just the addition. This is fundamental.

Sec. 150, subd. 1 (d), is both clear and explicit. It provides that where the buyer has met the requirements of rescission, he may "recover the price or any part thereof which has been paid." This language needs neither clarification nor comment. It both creates and limits the seller's obligation. Yet, in the Waldman Case, supra, the Court added to its obligation, by requiring the seller, in addition to returning the purchase price of the refrigerator, also to pay for the fruit it had spoiled; upon the theory of an implied promise brought into being by the breach of the very warranty which was the basis of the rescission upon which the action was founded. It is true that this additional obligation seemed to square with justice. It is true in the case at bar that the oil burned in excess of the warranty is a part of the direct damages. But in each of these cases, these damages could have been recovered in the second remedy given under Section 150, by keeping the goods and suing for all damages resulting from the breach of warranty. When the law creates or permits several remedies, it may not be assumed that each will attain full compensation in all cases. It is because of the possible varying conditions that the several remedies are created, and a choice given. If a party does not elect the most favorable, he should blame himself, rather than condemn the law. The choice having been voluntarily made, the Court must administer what has been selected. The defendants herein deliberately elected to rescind. They are thereby limited in their recovery to the amount they have paid on the purchase price."

The following cases (decided under identical provisions of the Uniform Sales Act or the selfsame for-

mer common law rule) are illustrative of the innumerable decisions holding that the return of the subject matter of the sale is irrevocable, and operates as a conclusive presumption of law that the buyer intended to rescind, the intent of the buyer being immaterial.

Henry vs. Rudge and Guenzel Co., 224 N.W. 294 (express warranties and exchange of shoes);

Boivard & Seyfang Mfg. Co. vs. Maitland, 92 Ohio St. 210, 110 N.E. 749 (exchange of steam engine);

Apex Chemical Co. vs. Compson, 171 N.Y.S. 61, (return of a vacuum pump);

Stanley Drug Co. vs. Smith, 313 Pa. 368, 170 A. 274 (the case quotes 2 Williston on Sales, 2nd Edition, Section 612, and holds "That a vendee who rescinds can only recover upon that basis (price) is evident, for it is exactly what the statute declares * * * The conclusion stated seems to be universal where the Uniform Sales Act is in force, as it is with us * * * ").

It is submitted that by its action in accepting the replacement coils without cost to it, plaintiff bound itself to the remedy of rescission, forsaking its right to bring an action for damages against defendants. The Arizona statutes and authorities are clear and controlling, and the authorities herein cited from other jurisdictions, interpreting the same provisions of the Uniform Sales Act, are equally persuasive.

CONCLUSION

For the foregoing reasons, and particularly in the event the Court should reverse the judgment in favor of defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, and against third-party defendant Authorized Supply Company of Arizona, the Court should reverse the judgment entered in the within action in favor of plaintiff Swift and Company and against these defendants.

Respectfully submitted,

DARNELL, HOLESAPPLE, McFALL & SPAID

By _____

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No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appelant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees,

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants,

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLEES ARIZONA YORK REFRIGERATION COMPANY, A CORPORATION, AND SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, A CORPORATION.

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STATEMENT OF APPELLEES ARIZONA YORK REFRIGERATION COMPANY and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY'S POSITION.

It would be considerably less than candid of defendants York, having taken the position in their Opening Brief that Swift and Company had elected the remedy of rescission, thereby barring its claim for damages, to argue the contrary of that position to the Court in York's response to Authorized Supply Companys' Opening Brief. Defendants York cannot properly take both sides of the argument and urge each with equal vigor.

By the nature of the judgments entered by the trial court (T.R. 36), defendants York are "in the middle" as it were, between Authorized Supply Company and Swift and Company. It is consistent with both law and justice that if Swift and Company is entitled to recover from the York companies, they, or rather Southern Arizona York Refrigeration Company, are entitled to recover over against Authorized Supply Company, as the claims of both Swift and Company and the York Companies are equally based on the fact of a "sale" of the same defective Bush coils. Contrariwise, if the Court should determine that the trial court erred in concluding that Southern Arizona York Refrigeration Company's return of the coils to Authorized Supply Company did not effectuate a rescission, barring a right to recover damages, it follows that a reversal of the judgment in favor of Swift and Company and against the York Companies should also be ordered.

It is submitted that the positions of all of the parties to the action and these appeals will be fully

presented to the Court at such time as the brief of Appellee Swift and Company is filed, and the Court will then be in a position to properly determine the issues raised by the joint appeals. The Swift and Company brief will undoubtedly point out the authorities in support of its contention that the language of Arizona Revised Statutes, Sec. 44-269, does not bar a buyer from the right to sue for damages for breach of a warranty of fitness. By equal force, Swift and Company's argument, and the authorities cited in support of it, apply to the position taken by Authorized Supply Company in defense of the Third-Party Complaint.

Respectfully submitted,

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By Richard C. Barney

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Three copies of the within Brief of Appellees Arizona York Refrigeration Company, a corporation, and Southern Arizona York Refrigeration Company, a corporation, were served this 22nd day of April, 1959, on:

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Appellee.

ANSWERING BRIEF OF APPELLEE SWIFT & COMPANY

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ANSWERING BRIEF OF APPELLEE SWIFT & COMPANY

FOREWORD

For the purposes of this brief we shall refer to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company as Appellants and Swift & Company as Appellee. All references to the pages in the transcript will be preceded by T.R.

Appellee agrees that the statement of the case as submitted by Appellants is correct, with one exception. The Appellants state, on page 3 of their opening brief:

> ". . . . the defective coils were returned by plaintiff (Appellee) to defendant Southern Arizona York Refrigeration Company (Appellant) . . ."

The evidence adduced at the trial of this case revealed that the Appellant Southern Arizona York Refrigeration Company replaced the defective coils with new coils with the permission of the Appellee (T.R.-73, 166, 167, 170, 180). Likewise, the trial court found, as a matter of fact, that this was the case (T.R.-32), and this finding of fact by the trial court has not been specified as error by Appellants.

Appellee believes that as between Appellants and itself only two questions are involved:

1. In the case of damages caused by a defective piece of machinery, does a replacement or substitution of the defective piece of machinery by the seller constitute ipso facto a rescission of the contract between the seller and the buyer?

2. Assuming, for the purpose of argument but not conceding that there has been a rescission of the contract, can a buyer rescind a contract and thereafter hold the seller liable for damages resulting from a breach of express and implied warranty of fitness under the laws of the State of Arizona?

ARGUMENT

1. In the case of damages caused by a defective piece of machinery, does a replacement or substitution of the defective piece of machinery by the seller constitute ipso facto a rescission of the contract between the seller and the buyer?

It is Appellee's contention that there has been no rescission of the contract between Appellant Arizona York Refrigeration Company and Appellee and that the contract between the parties is still in effect.

Furthermore, the contract expressly provides:

> "That the design, materials, and workmanship, of the machinery and all parts of the plant furnished and installed by the Contractor, shall be first-class in every respect, and suitable for the purpose intended.
>
> "That all parts furnished by Contractor are to operate and perform their functions properly and prove durable in reasonable service.
>
> "No payment in part or in whole shall be construed as a waiver of any guarantees of this contract." (Plaintiff's Exhibit 1 in evidence)

In the absence of rescission, under the only logical interpretation of the terms of the contract Appellants are liable for the damages caused by the defective coils sold to Appellee by the Appellant Arizona York Refrigeration Company.

To determine if there has been a rescission, we must ascertain the manner in which contracts can be rescinded.

According to Black on Rescission and Cancella-

tion, 2d Edition, Section 1, page 4, there are several ways to rescind a contract:

(a) By the contract itself reserving to either or both parties the right to rescind on the occurrence of certain conditions.

(b) By mutual agreement of the parties.

(c) By one of the parties rescinding the contract without the consent of the other for legal cause such as fraud or misrepresentation.

(d) By decree of court.

With respect to the case at bar, subparagraph (d) obviously does not apply, and, since an examination of the contract in question (Plaintiff's Exhibit 1) will show that there is no clause relating to rescission, subparagraph (a) does not apply.

The method of rescission described in subparagraph (b) does not apply for the reason that there is nothing in the record that even suggests Appellants and Appellee entered into a mutual rescission agreement.

This leaves the question of whether the method described in subparagraph (c) is applicable or, stated another way, whether a rescission can be implied by Appellee's permitting Appellant Southern Arizona York Refrigeration Company to substitute new coils for admittedly defective coils.

The case controlling on this point is *Clyde Equipment Co. v. Fiorito et al,* 16 F. 2d 106, decided by this Court. According to the facts, the plaintiff was a road builder who bought road machinery from the defendant. When the machinery proved defective, plaintiff returned it to the defendant and was given credit, and

thereafter plaintiff brought suit to recover special damages for breach of warranty. Defendant contended there was a rescission. This Court held:

> "The mere fact that personal property sold under a contract is returned to the vendor and credit given therefor on the account, does not constitute ipso facto a rescission of the contract. Whether or not property so returned and credited constitutes an abandonment of that part of the contract covering it is a matter of intention."

If the law, as stated in *Clyde Equipment Co. v. Fiorito et al* is correct, the key to this case lies buried in the question of "What was Appellee's intention when it allowed Appellant Southern Arizona York Refrigeration Company to replace the defective coils with new coils?"

To answer the question let us see what alternatives faced Appellee. First, Appellee could have refused to permit Appellants to remove the defective coils from the freezer room until the matter was finally settled by litigation. This, of course, would have rendered the freezer room unusable. Appellants suggest, citing a case from the City Court of Rochester, New York, *Bennett v. Piscitello,* 170 Misc. 177, 9 N Y S 2d 69, that it was the duty of Appellee to retain the damaged goods and sue for all damages resulting. If Appellee had followed this course, the freezer room would still be out of use, damages would still be accruing, and Appellants would be arguing that Appellee had failed to perform its fundamental duty to minimize the damages.

The other alternative was to do what Appellee did —permit Appellants to minimize the damages they

had caused, as much as possible, by substituting new coils for the defective coils.

We submit that if this Court holds that Appellee intended to rescind the contract in question, the Court is stating in essence that Appellee was willing and intended to excuse Appellants for a loss which has cost Appellee almost $10,000. It is counsel's opinion there is no evidence in the record to support such a conclusion.

2. Assuming, for the purpose of argument but not conceding that there has been a rescission of the contract, can a buyer rescind a contract, and thereafter hold the seller liable for damages resulting from a breach of express and implied warranty of fitness under the laws of the State of Arizona?

For the sake of this argument we will assume:

(a) That Appellee did intend to rescind the contract in this case, and

(b) That Appellee, instead of permitting substitution of the defective coils, returned the defective coils to Appellants.

The general rule is well known, namely, that upon a sale of personal property where the goods do not measure up to the warranty, the buyer has an election to return the goods and rescind the sale or to keep the goods and sue for damages.

However, exceptions prove the general rule. In this case the exception to the general rule is ARS Section 44-270:

> "Nothing in this chapter shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law inter-

> est or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

Counsel for Appellee have been unable to discover any Arizona cases involving an interpretation of ARS Section 44-270. However, there are three recent cases from other jurisdictions which have discussed the effect of this section. The first case, decided by the Maryland Court of Appeals, was *Martha F. Russo v. Hochschild Kohn and Co., Inc.,* 184 Md. 462, 41 A. 2d 600, 157 A.L.R. 1070, mentioned in Appellants' brief. The facts were that plaintiff purchased hair lacquer pads worth $1.10 from the defendant and later returned them to the defendant at defendant's request and received a credit. Defendant's counsel made the same contention which Appellee does in the case at bar; namely, no other remedy can be granted the buyer once he has elected to return the goods. A majority of the court held:

> "That the contract . . . even if rescinded as to ordinary damages was not rescinded with reference to special damages, and that action in assumpsit on the contract will lie to recover special damages directly resulting from the breach of warranty of fitness."

Marko v. Sears Roebuck & Co., 24 N.J. Super 295, 94 A. 2d 348 (1953) involved the following situation:

Plaintiff went to defendant's store and advised defendant's employee that he wanted a lawn mower to be used on uneven ground to cut grass and weeds. The catalog description of the lawn mower contained the following: "blade completely shielded". After plaintiff purchased the lawn mower, he operated it for a short time until the machine came in contact with a

rock. Upon striking the rock the machine bounced back and injured plaintiff. While in the hospital plaintiff requested a friend to return the lawn mower and obtain a refund, which was done. Thereafter plaintiff sued for damages on the ground of breach of an express warranty.

Defendant's motion for dismissal was granted by the trial court at conclusion of plaintiff's case. On appeal, the defendant argued, as Appellants do here, that plaintiff had elected the remedy of rescission and that, therefore, no other remedy for breach of warranty could be granted because of the New Jersey statute (R.S. 46:30-75 (2) N.J.S.A.) identical to ARS Section 44-269 B:

> "When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

The court in the *Marko* case held that damages for personal injuries resulting from a breach of warranty would be allowed "despite the fact that there has been a rescission and a repayment of the purchase price."

Garbark v. Newman, 155 Neb. 188, 51 NW 2d 315, follows the holding of the *Russo* and *Marko* cases. Furthermore, the *Garbark* case decided by the Nebraska court in 1952 is in direct conflict with the case of *Henry v. Rudge and Guenzel Co.,* 118 Neb. 260, 224 NW 294, decided by the same court in 1929, which is relied upon by the Appellants.

In the cases cited by Appellants in support of their contention, we find no mention of any statute such as ARS Section 44-270, which saves special damages. As stated in the *Marko v. Sears Roebuck & Co.* case:

> "The purpose and effect of the provision of the

Uniform Sales Act that the buyer or seller may recover special damages in any case where the law permits the recovery of such damages is to permit the recovery of special damages without regard to whether the transaction to which they are incidental has been rescinded or affirmed."

CONCLUSION

The judgment of the trial court must be affirmed on either of the following grounds:

1. Appellee did not rescind the contract with Appellant Arizona York Refrigeration Company and is entitled to recover all damages flowing from the breach of the express and implied warranties of fitness that the coils supplied by Appellant would perform their function properly.

2. If it could be found that Appellee rescinded the contract, Appellee is nonetheless entitled to recover damages from Appellants by virtue of ARS Section 44-270.

Respectfully submitted,

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APPENDIX

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Three copies of the within Brief of Appellee Swift & Company, a corporation, were received this_____ day of May, 1959.

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No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees.

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants.

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

REPLY BRIEF OF APPELLANT AUTHORIZED SUPPLY COMPANY.

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Appellants.

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

REPLY BRIEF OF APPELLANTS AUTHORIZED SUPPLY COMPANY.

Foreword.

The brief of the Appellee, Swift and Company, raises questions which vitally concern the appeal of Authorized Supply. Where that appellant and Southern Arizona York Refrigeration Conpany, the other appellant, have both taken the position that the exchange of coil units heretofore explained amounted in law to a binding election of remedies precluding an action by Swift for damages, Swift has attempted in its own brief to refute that argument.

This brief, therefore, is concerned with considering and answering the questions raised and arguments made in the brief of Swift and Company.

Argument.

It has previously been pointed out, in this appellant's opening brief, that the Arizona statute controlling on the problem is clear and unambiguous, and that the overwhelming weight of American authority supports the construction placed upon it by this appellant.

Appellee Swift makes two arguments:

1. That the case of *Clyde Equipment Company v. Fiorito, et al.,* 16 F. 2d 106, is controlling here and requires the result reached in the trial court.

2. That Arizona Revised Statutes, 1956, Section 44-270, set out in appellee's brief, as construed in three cases from other jurisdictions, compels the result for which it argues.

Appellant Authorized Supply Company will consider those propositions in that order.

I.

Does *Clyde Equipment Co. v. Fiorito, et al.,* 16 F. 2d 106, control here on the question of whether Swift and Southern Arizona York made a binding election of remedies? In that case, the defendant was a manufacturer of road equipment who supplied to the buyer with rock crushing machinery which included certain rolls. The rolls proved defective and were returned to the seller. The trial court held that this did not bar buyer's subsequent action for resulting damages. *On appeal, the evidence was not before the court.* This Court merely said that the evidence would be *presumed* to have shown

> ". . . an understanding, more of less definite, that the contract—which included other items than these . . . rolls—was not rescinded . . .; and where, as here, the evidence is not before us, we must . . . so construe the finding. . . ."

Here the evidence is before this Court, and there is in it not a vestige of evidence of any such understanding between Authorized Supply, the seller, and Southern Arizona York, the buyer. All the parties agreed that the transaction was simply the return of defective coils and their replacement with new ones, with no understanding or conversation whatever concerning rescission or the buyer's reservation of any rights.

Further, if dicta in the *Clyde* case can be cited as supporting Swift's position, it should be pointed out that that dicta is clearly wrong. That case came to this Court from Washington state in 1926. The law of Washington should have been applied. In 1909, in *Houser and Haines Mfg. Co. v. McKay,* 53 Wash 337, 101 Pac. 894, decided under the common law, the Washington court, ruling squarely on the very question now before this Court, said:

> "If (buyer) chose to exercise the special remedy by returning the article to the seller, he is then confined to a recovery of the purchase money paid and cannot maintain an action to recover damages for breach of the warranty . . ."

and

> "We have not been able to find any diversity of authority on this question."

In 1925 Washington enacted the Uniform Sales Act, including Section 69 in the same form in which it exists today in the Arizona Revised Statutes, 1956. The rule was thereafter recognized, and Section 69 quoted, in *Crandall Engineering Co. v. Winslow Marine Ry., etc., Co.,* 188 Wash. 161 P. 2d 136 (1936). In short, the rule in Washington is and always has been the rule urged here by this appellant. The dictum of the *Clyde* case has never been the law of Washington or of any other state within the appellate jurisdiction of this Court.

II.

Does Section 70 of the Uniform Sales Act require the result reached here in the trial court?

Three cases have held that it does. They are cited in Swift's brief, and are:

Russo v. Hochschild Kohn & Co., Inc., 184 Md. 462, 41 A. 2d 600;

Marko v. Sears, Roebuck & Co., 24 N. J. Super. 295, 94 A. 2d 348;

Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315.

The last two reply on *Russo; Russo* relies on Section 70.

That section reads as follows:

> "Nothing in this chapter shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damage may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

The Section, it is submitted, is entirely clear, and means exactly what it says. (For case properly applying it, see *e.g., Smith v. Johnson,* 120 Wash. Dec. 300, 98 P 2d 312.) *Where by law special damages are recoverable,* the Uniform Act does not affect the right to recover them. The Section is impossible of proper application here because, *by common law as well as Section* 69, special damages are not and were never recoverable by the buyer after the goods bought had been returned by him and replaced or the price refunded. As is pointed out in this Appellant's Opening Brief, the Uniform Sales Act codified, but did not change, the common law. The cases which have applied Section 70 here have, we submit, intentionally misread the Section in an effort to justify the action of the courts in avoiding harsh results. Hard cases have in all three instances been permitted to make bad law. Section 69 of the Statutes is clear and unambiguous, and denies Swift and Southern Arizona York their action here. That result may indeed be a harsh one. But it is a result required by crystal-clear legislative action. If the law is to be changed, it is for the Legislature of Arizona to change it, as the New York legislature did (see this Appellant's opening brief). Section 69 does not itself take away any right of action from Swift or Southern Arizona York. It merely recognizes that they here never at common law had any right of action after the coils were returned and replaced, and continues in force the rule denying the right. Section 70 cannot properly be read to change the common law and was never so intended. It

cannot properly be read to create in Swift and Southern Arizona York a cause of action non-existent at common law and expressly repudiated in Section 69.

Conclusion.

The overwhelming weight of American authority, both at common law and under the Uniform Sales Act, supports this appellant's position that when Swift and Southern Arizona York returned the defective coils for replacement, they elected their exclusive remedy, and cannot recover in this action. The legislative purpose in adopting the Uniform Sales Act, manifest in the language of the Act itself, was to make the rules in Arizona uniform and consistent with those generally prevailing elsewhere. There are 3 states in which decisions permit this action against this Appellant. Elsewhere, the long-standing and universal rules is well-established that the action cannot be maintained. The Arizona courts would, we submit, follow that rule, having twice done so in the past (see this appellant's opening brief). This Court should also follow it.

The judgment against Authorized Supply Company should be reversed, and the trial court directed to enter judgment in its favor on the Third-Party Complaint.

Respectfully submitted,

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By ROBERT O. LESHER,

Attorneys for Authorized Supply Company.

No. 16274

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Appellee.

PETITION FOR REHEARING

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SWIFT & COMPANY, a Corporation,
Appellee.

PETITION FOR REHEARING

STATEMENT OF GROUNDS FOR REHEARING

1. The Court of Appeals erred in permitting the assertion by appellee Swift & Company of a wholly new theory of the case on a Petition for Rehearing, and in entering its Opinion on Rehearing adopting said theory thereby reversing the prior Opinion of this Court.

2. The Court of Appeals erred in denying appellees Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company the right to recover over against appellant Authorized Supply Company of Arizona, and in entering judgment reversing the trial court accordingly.

ARGUMENT

Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit does not make specific reference to the right of a party to file a petition for rehearing as to a "Judgment" entered in an opinion on a rehearing once granted. The Rule does not deny the right to so petition, and it is believed that this Court has full power to grant a second rehearing. The Supreme Court of Arizona, for example, recognized its "inherent power" so to do in *Lane v. Mathews,* 75 Ariz. 1, 251 P. 2d 303.

It is submitted by appellees Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company ("York") that by virtue of its opinion on rehearing, dated April 21, 1960, the Court has accomplished serious injustice to these appellees York, while attempting to do "justice" for appellee Swift & Company. It is further submitted that the Court's action is clearly contrary to binding precedent in this the Ninth Circuit, and in other circuits of the United States Court of Appeals, as well as in other appellate courts throughout the country.

The obvious effect of the opinion on rehearing is to cause all damage and loss claimed by Swift & Company to fall solely on the appellees York, innocent purchasers from appellant Authorized Supply Company of Arizona of inherently defective refrigeration coils, said York companies having no legal right to assert any remedy whatever against the real wrongdoer, Bush Manufacturing Company; for it is only through its vendee, Authorized Supply Company, that a remedy could be asserted over against it.

"In the interest of justice" the Court has set aside a firmly established principle of appellate jurisdiction and has given Swift & Company the benefit of a wholly new lawsuit and favorable judgment; at the same time the Court has penalized appellees York with a legal defense which Swift has from the beginning quarreled with and attempted to overcome, as unreasonable and unfair. If the "interest of justice" is to be the paramount consideration, it is respectfully submitted that this Court should have affirmed the judgment of the District Court in its entirety, as it did permit the doing of justice to *all* parties by giving to the distributor, Authorized Supply Company, the opportunity to assert the ultimate remedy against the wrongdoer Bush *with whom it was in privity.* Ironically enough, the Swift & Company Petition for Rehearing as well as its Answering Brief on Rehearing sought only that the Judgment of the District Court be affirmed as it was written, to wit, in its entirety.

The decision on rehearing most frankly announces that Swift " . . . has practically, if not completely, abandoned the theory upon which the case was presented to us"; that "no such contention (that the Swift-York transaction was a contract for work, labor and materials) appears in such appellees' brief filed prior to the original hearing, nor was it mentioned by such appellee on oral argument"; and that ". . . in the interest of justice we should consider appellee Swift & Company's new contention on this rehearing regardless of such appellee's failure to present such contention on the original appeal."

This very Circuit in *Mitchell v. Greenough,* 100 F. 2d 1006, cert. den. 306 U. S. 659, 59 S. Ct. 788, 83 L.Ed. 1056, decided in 1939, (cited by York on page 1 of its Brief on Rehearing) turned down a plaintiff's con-

tention that a three year Washington statute of limitations, within which period of time the action had been filed, was controlling, saying, "A party cannot on petition for a rehearing shift his position". Is there not an equally valid claim that the "interest of justice" called for different treatment for that plaintiff? In the *Mitchell* decision the Court cited opinions from the Eighth, First and Second Circuits as ample precedent for the ruling. A call to the "interest of justice" could just as well have been made in *Marion Steam Shovel Co. v. Bertino,* 8 Cir., 82 F.2d 945, wherein it was held that a party could not for the first time on rehearing make a contention of non-negligence of an agent for whom the party was alleged liable, saying "These questions were waived on the original hearing and must be treated as abandoned." The Eighth Circuit also recognized that an issue which was not brought to the attention of the trial court was not available on appeal. Equally is this rule applicable in the case now before this Court. In its Brief on Rehearing appellees York cited *Otoe County Nat'l. Bank v. Delaney,* 88 F.2d 238, which in turn cited some eighteen cases from the United States Courts of Appeals, with emphasis on the Eighth Circuit and the United States Supreme Court, affirming the well-nigh universal rule that questions not argued in the complaining party's brief will not be considered on his petition for rehearing. Typical of the more recent holdings in the State courts is *Acme-Goodrich, Inc. v. Neal,* 158 N.E. 2d 299, to the effect that where a plaintiff had proceeded through the trial court and the appellate court on the theory that its action was filed under statutory provisions to review a judgment, it could not on a petition for rehearing in the appellate court successfully assert that it had mis-designated the procedure and that it was actually maintaining an application to vacate and

set aside a void judgment. These decisions are certainly not without adequate reason.

It is submitted that in every one of the above-mentioned and the other innumerable cases decided in the several Circuits and in the appellate courts of the various states denying a party the right on a petition for rehearing to assert a new theory (one not presented at trial or on appeal), a worth while argument existed that the "interest of justice" called for such reconsideration.

The danger in succumbing in the face of a call to the "interest of justice" is that it leads to rulings predicated in large measure upon how attractive the "justice" feature of a particular case may appear to the judges before whom the case is presented. As an inevitable end result, the decisions rendered on that basis constitute in greater or lesser measure the writing of individual law for individual cases. Appellees York submit that it is a great deal more important in the administration of justice that controlling principle and precedent be followed (in this instance, that cases should be reviewed on the issues conceived by the contending parties in the trial court and the questions presented to and determined by the trial Judge) than that a particular party in a particular case be relieved of the consequences of his own freely chosen but later deemed incorrect theory of his case. If the responsibility is to be shifted from the parties to the courts to choose and assert the best or the most persuasive theory or remedy in each case, then the rules of orderly procedure are erased and the door is flung open to destruction of that stability and certainty which is in no small degree the essence of the Anglo-American judicial process.

Practical ramifications affecting much future litigation are suggested by the Court's Opinion on Rehearing sanctioning Swift's sudden reversal of position. The Opinion may well signify that a duty is now imposed upon a defendant in every case to anticipate and prepare for trial on every possible theory which a plaintiff might ultimately assert, even on appeal, no matter how clearly a single theory of recovery may be stated in the complaint. One might also not unreasonably contend that the over-all sense of the Opinion points to the existence of an additional obligation upon a party in a law suit to fill in gaps in theory or evidence in his adversary's case by pleading or testimony at trial (thereby, perhaps, engineering his own defeat) in order to avoid the possibility of a non-recourse reversal on appeal or rehearing.

The Court is urged to carefully once again read the Amended Complaint on which the instant dispute proceeded to trial, and then with equal care review the Findings of Fact and Conclusions of Law entered by the Honorable District Judge. (Transcript of Record pages 3-6 and 28-35). Emphasis was placed on these critical instruments at pages 3 and 4 of Yorks' Brief on Rehearing. The Court's Opinion on Rehearing speaks *only* of express warranties in supporting Swift & Company's new found theory, but ignores the interlocking and inseparable claim of Swift in both Counts I and II of the Amended Complaint and the Findings and Conclusions of the District Court of implied warranties having their existence only in the Sales Act itself. If, as the Court says, ". . . the relevant findings of fact of the trial court are amply supported by the evidence" and "We find no error in the conclusions of law reached by the District Court", how can any conclusion be reached but that Swift's

case was pleaded, tried *and decided* in the District Court *only* as a claim for damages for breach of express *and* implied warranties of a *contract for the sale of goods?*

It is submitted in all candor that the Court had two alternative choices on rehearing, either one of which would have accomplished a better legal or equitable result, depending upon where the primary emphasis should be placed, than has now occured: Stand firm on the original opinion of October 12, 1959 on the basis that it is too late for Swift to shift its entire position on rehearing and that it, rather than the Court or another party should accept the responsibility for the consequences of its own choice of legal theory and remedy; or, "in the interest of justice" to *all* parties, enter an opinion affirming the whole judgment of the District Court on the basis of the findings of fact and conclusions of law entered by it. The former of these two choices has the merit of placing responsibility for whatever "injustice" may fairly be claimed on the original plaintiff Swift & Company where it belongs. The advantage of the latter of the two choices may lie in the field of equity, as it would permit Authorized Supply Company to move against the manufacturer of the faulty merchandise.

CONCLUSION

Appellees York pray the Court to grant the within Petition for Rehearing and after rehearing enter its Opinion and Judgment either in full conformity with its Opinion of October 12, 1957, or reversing its Opinion of April 21, 1960 on Rehearing wherein these appellees were denied the right to recover over against

appellant Authorized Supply Company of Arizona.

It is requested, in accordance with Rule 23 of this Court, that the case be reheard en banc.

Respectfully submitted,

DARNELL, HOLESAPPLE, McFALL & SPAID

By _____

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CERTIFICATION

RICHARD C. BRINEY, one of the attorneys for Appellees Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, hereby certifies that the foregoing Petition of Appellees York for Rehearing is, in his judgment well founded and is not interposed for delay.

Dated the 17th day of May, 1960.

Richard C. Briney

Attorney for Appellees York

Three copies of the within Petition of Appellees York for Rehearing were

received this 17 day of May, 1960.

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POST & PRINTERS

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PETITION FOR REHEARING

STATEMENT OF GROUNDS FOR REHEARING

I.

The Court of Appeals erred in ruling that Appellee Swift & Company had no right to recover damages upon the theory that Appellee had rescinded its contract with Arizona York Refrigeration Company by permitting the replacement of only a portion of the equipment which was covered by their contract, since the contract was an indivisible contract and a partial rescission cannot be had except upon mutual agreement of the parties to such contract, and there was no such agreement between them.

II.

The Court of Appeals erred in holding that:

> "Under the Arizona statute . . . that rescission follows as a matter of law the return of property and the return operates as a conclusive presumption of law that the buyer intended to rescind.",

because under Arizona law rescission is a question of fact and not a question of law.

III.

The Court of Appeals erroneously concluded that there was no contention by plaintiff that there was no understanding or conversation concerning rescission or the reservation of rights of plaintiff to recover for its damaged products, for the Transcript of Record shows that there was a definite conversation concerning such matters.

IV.

The Court of Appeals erred in adopting the decision of an Arizona Superior Court trial judge made in the case of *Charles Roberts v. J. C. Penney Company* as being the rule of decision in the State of Arizona, since both this Court and the Supreme Court of the United States have held that such a decision does not control decisions of Federal Courts.

ARGUMENT

If the rule announced by the Court in this case is permitted to stand, one who purchases a new automobile with the customary warranties, by merely permitting his seller to replace a defective windshield wiper would rescind the contract of sale, and irrespective of what other defects might thereafter be discovered the buyer would have no further rights against his seller.

If this is the rule, then under the holding in this case, if another defect develops in other portions of the machinery covered in its contract with Appellant Arizona York Refrigeration Company, Appellee Swift & Company would have no rights to any redress, because of such defect, although it was unknown to Swift & Company at the time the coils were replaced. This for the reason that under Arizona law:

> "To rescind a contract is not merely to terminate it, but to abrogate it and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had been made."
>
> *Reed v. McLaws et ux,* (1941), 56 Ariz. 556, 110 P. 2d 222.

The general rule is that it is essential to the rescission of a sale for breach of warranty that *all* the goods must be returned; the buyer may not return a part and retain the balance. *McClaran v. Longdin-Brugger Co.,* (1926), 240 Ohio App. 434, 157 N.E. 828.

The exception to the general rule is where the con-

tract is severable, then in such instance there may be a rescission in part. *Clifford v. Stewart,* (1922), 153 Minn. 382, 190 N.W. 613.

Here the contract was not severable and the rule is clear that neither a seller nor a buyer is permitted to affirm a contract in part and rescind as to the residue. The United States Court of Appeals of the Seventh Circuit, in *Reno Sales Co., Inc. v. Pritchard Industries Inc.,* (1949), 7th Cir., 178 F. 2d 279, stated the rule as follows:

> "Defendant admits that it is a well settled rule of law that a purchaser is not permitted to affirm a contract in part and rescind as to the residue. . ."

The rule is likewise stated in 77 CJS 798, Section 101, Sales, as follows:

> "Generally speaking, a contract of sale may be rescinded only in toto; it cannot be affirmed in part and disaffirmed, repudiated, or rescinded in part by either the seller or the buyer."

In this case the evidence was clear that by its contract with Appellant Arizona York Refrigeration Company, Appellee Swift & Company was to acquire a complete refrigeration system for the specific purpose of refrigerating its new storage plant in Tucson, Arizona. It was not simply a contract for the Appellant Arizona York Refrigeration Company to furnish a set of Bush coils. It was not a contract to furnish any particular item for use in a refrigerating system, but clearly was a contract for the furnishing of all materials and labor for a complete refrigerating system. As such it was a contract that was not sever-

able. It not being severable there can be no rescission less than a complete rescission. The evidence in this case is clear that at most there was only a claimed partial rescission. Such is not permitted under the law.

We respectfully submit that under the laws of Arizona the actions of the buyer, Appellee Swift & Company, in permitting a replacement of that portion of the machinery which was defective did not constitute a rescission.

The case of *Charles Roberts v. J. C. Penney Company,* Superior Court of Maricopa County, Arizona, No. 76505 (1954), was not appealed and merely represented the opinion of one of the many trial judges in Arizona; an opinion which counsel asserts is not binding on this Court, and should not be adopted by this Court as expressing the law of Arizona. It is not even binding upon the other Superior Courts in Arizona.

It is impossible for Appellee Swift & Company to believe that if the facts in the instant case had been presented to Judge Stevens, rather than the facts before him in the *Roberts* case, he would have reached the same conclusion.

Consider again the distinguishing facts in the two cases. In the *Roberts* case the plaintiff purchased a pair of shoes which he claimed were defective and injured him. He accepted from the seller a new pair of shoes, and, based on this acceptance, the trial judge of the court of first instance held that the contract had been rescinded. Certainly, this is distinguishable from the facts in the instant case.

In this case, Appellee Swift & Company had paid to seller thousands of dollars for labor and machinery installed in its plant. One portion of this machinery

proved defective, resulting in the escape of large quantities of ammonia gas and the loss of products being refrigerated in excess of $9,000. The seller, or its successor, then replaced that small part of the machinery which was defective so that the plant could again be placed in operation. Had Appellee Swift & Company refused to permit the repair of the machinery until such time as it had been reimbursed for all of its damages, the damages for the loss of its products, the loss of profits during the time the plant was inoperative, and the other damages that would have been incurred would have increased Swift & Company's loss by many thousands of dollars.

Would this court, if such had been the case, hold that Swift & Company was justified in refusing to permit the machinery to be repaired until it had been fully compensated for all its loss, including the cost of replacing the defective coils?

If the Court's holding in this case is to stand, that is the rule which this Court will be adopting for the State of Arizona; in short that a Seller who has furnished defective equipment is not entitled to minimize damages by immediately curing the defect, but must be refused an opportunity to minimize damages until such time as the entire loss to his customer has been determined and paid, or until his customer waives all further rights under the contract of sale.

It is Appellee Swift & Company's position that under subsection A 4 of Section 44-269 ARS, reading:

> "Rescind the contract to sell or the sale and refuse to receive the goods or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.",

rescission does not follow as a matter of law.

In the Arizona case of *Reed v. McLaws et ux,* (1941), 56 Ariz. 556, 110 P. 2d 222, defendant purchased land and equipment under contract and after making several payments stopped. When sued by the plaintiff, defendant alleged rescission of the contract. The trial court apparently held the issue of rescission immaterial, and for that reason did not decide it. Upon appeal the Arizona Supreme Court held that "whether or not there was a rescission of the contract is also a *question of fact.*" (Emphasis ours)

We call the Court's attention to the fact that, in order to recover the purchase price under subsection A 4 of Section 44-269 ARS, a buyer must rescind the contract *and* return or offer to return the goods. Because of the conjunction "and" there are two separate prerequisites to the recovery of the purchase price, namely, rescind the contract *and* return the goods.

As authority for the foregoing paragraph, we cite to the Court the case of *Abdallah, Inc. v. Martin,* (1954), 242 Minn. 416, 65 N.W. 2d 641, wherein the court stated, in construing MSA 512.69, paragraph D, identical to subsection A 4 of Section 44-269 ARS:

> "In our opinion, rescission and return of the goods are not one and the same thing. In other words, a return of the goods in itself is not a rescission. Rather, it appears to us that return may be more properly classified as an element of rescission. Rescission, the unmaking or abrogation of a contract, requires intent to do so. It may be conceded that in some cases a rescission might be inferred from the return of the goods, as where a buyer, on discovering a breach of warranty, demands to return *all* he

has acquired under the contract and to receive back what he has paid."

Since rescission requires an intent, and since intent must be determined from the facts, the question of whether a party rescinded a contract is a question of fact and not a question of law. By holding that rescission follows as a matter of law the Court is, in effect, making a new contract for the buyer and the seller.

In the *Abdallah, Inc. v. Martin* case (supra) the Court held that accepting a substitution or replacement of defective merchandise did not in and of itself constitute a rescission of the original contract.

The record in this case shows that with respect to rescission the trial court found, as a fact, that there was no intent on the part of any of the parties to rescind the contract. (TR. 32). It certainly is the rule of this court that it will not disturb the findings of the trial court where there is any evidence to support such findings. There is abundant evidence in the record to support this finding.

The Court, at page 6 of its decision, stated:

"Plaintiff does not contend that in connection with such transactions it reserved a claim for damages resulting from the breach of the contract, or that there was any understanding or conversation whatever concerning rescission or the reservation of any rights."

Obviously, the Court overlooked the portion of the testimony of the witness A. C. Black, which appears as follows on page 104 of the Transcript of Record:

"Q. Was there anything else said, anything about the damage to this product or anything of that nature in your conversation?

A. Well, at the same time during the conversation, as well as I remember, to my best recollection, was that Mr. Robertson made the statement that they would, their insurance company would pay for the damaged product."

The Court will note that this was a part of the same conversation during which the Arizona York Refrigeration Company, through its officer, Mr. Robertson, offered to replace the defective coils free of charge. This certainly is sufficient for the trial court to find that there was a definite understanding by the Appellee Swift & Company that by its permitting the substitution of the defective coils it would not be deprived of its rights to recover for its damaged product.

This testimony standing alone is sufficient to support the Court's finding of fact that there was no intention on the part of any of the parties to the agreement to effect a rescission of the agreement merely by the permitting of the substitution of new coils for the defective ones.

As this Court undoubtedly knows, although Arizona Superior Courts technically are considered courts of record, their decisions are neither published nor digested in any manner whatsoever. Article 6, Chapter 16, Arizona Constitution.

It is entirely probable that there are decisions of our Superior Courts holding exactly contrary to the holding in the *Roberts* case. In order to prove or disprove such fact counsel would have to search each and every case filed in the office of the clerk of the Superior Court in each of the fourteen counties of Arizona, commencing with the date the Uniform Sales Act was adopted which was prior to statehood.

The United States Supreme Court recognized the intolerable burden, both financial and time-wise, that would be imposed upon counsel if the Federal District Courts were to be bound by these unpublished and undigested decisions of the state Superior Courts. In its decision in the case of *Mary Bell King v. Order of United Commercial Travelers of America,* 333 US 153, 68 S. Ct. 488, 92 L. ed. 608, it gave the reasons why these unreported and undigested decisions should not be binding upon the Federal judiciary.

Furthermore, this Court, in the case of *State of California, Department of Employment v. Fred S. Renauld & Co., et al,* (1950), Ninth Circuit, 179 F. 2d 605, held that Federal Courts are not bound to follow trial courts' decisions unless "a goodly number of trial courts of the state generally and for a considerable period of time have adhered to a common interpretation of the point."

In view of the decision in the *King case* and the rule enunciated in the *State of California* case, counsel for Appellee Swift & Company earnestly submit that the Federal District judge in this case should not follow the Maricopa County Superior Court case of *Charles Roberts v. J. C. Penney Company.* Rather, we urge the Court that the Federal District judge in this case, paraphrasing the language used in the *King* case, was justified in holding the decision in the *Roberts* case not controlling, and could proceed to make his own determination of what the Supreme Court of Arizona would probably rule in a similar case as the one before him.

Regarding the Federal District judge's opinion of what the Arizona Supreme Court might rule, we wish to mention that James A. Walsh, the Federal District

Judge in this case, prior to his appointment to the Federal bench, served for several years as a distinguished and competent judge of the Arizona Superior Court, County of Maricopa.

It seems clear that where there has been only one decision of a Superior Court case cited to this Court, the opinion of the United States District judge, being a former Superior Court judge himself of the same county, is entitled to greater weight than that of the judge who has been cited to this Court, particularly where the factual situation is of such great importance and so vastly different.

Counsel for Appellee Swift & Company asserts that the Federal Court in this case is not bound by, nor should it consider, the decision of the Arizona Superior Court in the case of *Charles Roberts v. J. C. Penney Company,* of Maricopa County, Arizona, No. 76505 (1954).

CONCLUSION

For the reasons stated above, Appellee Swift & Company requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed and the judgment of the United States District Court be affirmed.

Respectfully submitted,

BOYLE, BILBY, THOMPSON & SHOENHAIR
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No. 16274

United States
Court of Appeals
for the Ninth Circuit

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation, Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation, Appellees.

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation, Appellants.

vs.

SWIFT & COMPANY, a Corporation, Appellee.

Transcript of Record

Appeals from the United States District Court for the District of Arizona

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif. — 2-19-59

No. 16274

United States
Court of Appeals
for the Ninth Circuit

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation, Appellant,

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Transcript of Record

Appeals from the United States District Court for the District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
For the District of Arizona

No. Civ. 909-Tuc.

SWIFT & COMPANY, a corporation, Plaintiff,

vs.

ARIZONA YORK REFRIGERATION COMPANY, a corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a corporation, Defendants.

AMENDED COMPLAINT

Comes now the plaintiff by its attorneys, Boyle, Bilby, Thompson & Shoenhair, and for cause of action against defendants alleges as follows:

Count One

1. Plaintiff is a corporation incorporated under the laws of the State of Illinois and authorized to do business in the State of Arizona; defendants are domestic corporations incorporated under the laws of the State of Arizona and authorized to do business in this state; the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. On or about May 31, 1955, defendant Arizona York Refrigeration Company entered into a contract with plaintiff to do certain work for plaintiff at 950 East 17th Street, Tucson, Pima County, Arizona.

3. Under said contract defendant Arizona York Refrigeration Company, both expressly and impliedly, warranted all equipment, material and workmanship furnished by defendant Arizona York Refrigeration Company against defects.

4. On or about December 5, 1955, the express and implied warranty provided under said contract was breached by defendant Arizona York Refrigeration Company when ammonia escaped from defective equipment installed by defendant Arizona York Refrigeration Company. Said ammonia contaminated products of plaintiff stored at 950 East 17th Street, and damaged part of the building located at said address.

5. As a result of said breach of warranty, plaintiff suffered damages in the amount of $10,322.60.

Count Two

1. Adopts paragraph 1 of Count One as hereinbefore set forth.

2. On or about May 31, 1955, and at other times thereafter, plaintiff, expressly and by implication, made known to the defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company the particular purpose for which certain goods were required, and plaintiff relied on defendants' skill and judgment in so doing.

3. Thereafter plaintiff purchased certain goods from the defendants, which goods were installed by defendants at 950 East 17th Street. Plaintiff, in

purchasing said goods from the defendants, relied upon the defendants' skill and judgment and relied upon the implied warranty of the defendants that the goods were reasonably fit for the purpose for which they were intended.

4. Defendants breached said implied warranty in that they sold, furnished and installed goods that were not reasonably fit for the purpose for which they were intended, as a result of which breach large quantities of ammonia escaped from said goods contaminating large quantities of plaintiff's products stored upon its premises at 950 East 17th Street and damaging portions of plaintiff's premises at 950 East 17th Street.

5. As a result of said breach, plaintiff suffered damages in the amount of $10,322.60.

Count Three

1. Adopts paragraph 1 of Count One as hereinbefore set forth.

2. Defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company did certain work during 1955 at 950 East 17th Street for the plaintiff, for which they were adequately compensated.

3. Said work was done in a careless and negligent manner.

4. On or about December 5, 1955, as a result of said negligent and careless work, ammonia contaminated products of the plaintiff stored at 950 East

17th Street, and said ammonia damaged parts of the building located at said address.

5. As a result of said careless and negligent work and the subsequent contamination of said goods and damages to said building, plaintiff suffered a loss in the amount of $10,322.60.

Wherefore, plaintiff prays judgment against the defendant Arizona York Refrigeration Company or defendant Southern Arizona York Refrigeration Company, or against both defendants, in the amount of $10,322.60 and for its costs herein expended.

BOYLE, BILBY, THOMPSON
& SHOENHAIR,
/s/ B. G. THOMPSON, JR.,
Attorneys for Plaintiff.

Notice of Mailing Attached.

[Endorsed]: Filed February 7, 1958.

In the District Court of the United States
For the District of Arizona

Civ. No. 909—Tuc.

SWIFT & COMPANY, Plaintiff,

vs.

ARIZONA YORK REFRIGERATION COMPANY, a corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a corporation,
Defendants and Third-Party Plaintiffs,

vs.

AUTHORIZED SUPPLY COMPANY OF ARIZONA, an Arizona corporation,
Third-Party Defendant.

ANSWER TO AMENDED COMPLAINT

Come now the defendants and answer the Amended Complaint on file herein as follows:

First Defense

The Amended Complaint on file herein, including each of Counts One, Two and Three, fails to state a claim against the defendants and each of them upon which relief can be granted.

Second Defense
Answer to Count One

I.

Admit the allegations contained in paragraphs 1 and 2 of the Amended Complaint.

II.

Deny each and every allegation contained in paragraphs 3, 4 and 5, and specifically deny that the plaintiff suffered damages in any sum or amount whatsoever by reason of any breach of warranty. Deny that any warranty expressed or implied was breached by Arizona York Refrigeration Company.

III.

Deny each and every allegation contained in Count One not herein expressly admitted.

IV.

As a further and separate defense, allege that if plaintiff sustained any damage to products or property by reason of escaping ammonia at 950 East 17th Street, Tucson, Arizona, same was solely the result of defective refrigeration coils sold and furnished to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company by Authorized Supply Company of Arizona, which said coils had been manufactured by the Bush Manufacturing Company of West Hartford, Connecticut. In this connection, allege that the defects in said coils, if any, were neither known to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company at any of the times referred to in the Complaint or material in the premises, nor were any such defects discoverable by either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company in the exercise of reasonable or ordinary care.

Allege that neither Arizona York Refrigeration

Company nor Southern Arizona York Refrigeration Company is responsible for or liable to the Plaintiff for any damage sustained by it as a result of any such defects in said refrigeration coils manufactured by the said Bush Manufacturing Company and sold and furnished to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company by Authorized Supply Company of Arizona.

Answer to Count Two

I.

Adopt by reference each and every allegation contained in paragraphs I and IV of their Answer to Count One of the Amended Complaint and incorporate same in this, their Answer to Count Two as if same were fully set out herein.

II.

Deny each and every allegation contained in paragraphs 2, 3, 4 and 5, except admit that a certain contract was entered into between plaintiff and Arizona York Refrigeration Company on or about May 31, 1955, whereby said Arizona York Refrigeration Company was to do certain work for plaintiff at 950 East 17th Street, Tucson, Arizona.

Further answering paragraphs 2, 3, 4 and 5, deny that plaintiff sustained any damage to products or property in any sum or amount whatsoever by reason of any breach of any warranty by either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, and deny that any warranty or warranties, implied or other-

wise, were either made or breached by either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.

III.

Deny each and every allegation contained in Count Two not herein expressly admitted.

Answer to Count Three

I.

Adopt by reference each and every allegation contained in paragraphs I and IV of their Answer to Count One of the Amended Complaint and incorporate same in this, their Answer to Count Three as if same were fully set out herein.

II.

Deny each and every allegation contained in paragraphs 2, 3, 4 and 5, except admit that Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company did certain work for Plaintiff from and after May 31, 1955, for a stated consideration.

Specifically deny that plaintiff sustained any damages in any sum or amount whatsoever as a result of any acts or omissions of either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, and deny that the said work was done in either a careless or negligent manner. In this connection alleges that the whole of said work was done in a careful and workmanlike manner, in full compliance with all of the terms,

conditions and specifications under which said work was to be done.

III.

Deny each and every allegation contained in Count Three not herein specifically admitted.

IV.

As a further and separate defense allege that the negligence of the plaintiff was a contributing cause to any damage sustained by the plaintiff.

Wherefore, defendants pray:

1. That plaintiff take nothing by its Complaint;
2. That the Complaint be dismissed;
3. That if a judgment be granted against either or both Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company and in favor of Plaintiff, said Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company have and be granted a judgment over against Authorized Supply Company of Arizona for the whole amount of any such judgment, including any costs assessed as a part of any such judgment;
4. For their costs incurred herein, and for such other and further relief as the Court deems proper.

DARNELL, HOLESAPPLE,
McFALL & SPAID,
/s/ By RICHARD C. BRINEY,
Attorneys for Defendants.

Notice of Mailing Attached.

[Endorsed]: Filed March 3, 1958.

[Title of District Court and Cause.]

SECOND AMENDED THIRD-PARTY COMPLAINT

Count One

Comes now Southern Arizona York Refrigeration Company, and for its complaint against Authorized Supply Company of Arizona, an Arizona corporation, third-party defendant, alleges as follows:

I.

At all times hereinafter mentioned Authorized Supply Company of Arizona was and is a corporation organized and existing under and by virtue of the laws of the State of Arizona and at all times herein mentioned was and is doing business within the jurisdiction of this Court.

II.

That plaintiff, Swift and Company, has filed an Amended Complaint, a copy of which is hereto annexed and marked Exhibit "A", against Arizona York Refrigeration Company, and Southern Arizona York Refrigeration Company, to recover damages to plaintiff's products and building allegedly resulting from an ammonia leak which occurred on or about December 5, 1955, on plaintiff's premises at 950 East 17th Street, Tucson, Arizona.

III.

The Amended Complaint of the plaintiff, Swift and Company alleges, among other things, that the

said incident or occurrence was the result of breaches of express and implied warranties alleged to run from defendants to plaintiff, in particular stating in Count One of the Complaint that by express and implied warranty defendant Arizona York Refrigeration Company warranted all equipment, material and workmanship against defects and alleges further in Count Two of the Complaint that plaintiff made known to defendants the purposes for which said goods were required and relying upon defendants' skill and judgment and relying upon the implied warranty of defendants that the goods were reasonably fit for the purpose for which they were intended, purchased said goods or equipment.

IV.

Alleges on information and belief that the ammonia leak referred to herein and in the plaintiff's amended Complaint was occasioned by and was solely the result of defective refrigeration coils sold and furnished to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company for good and valuable consideration during the year 1955 by Authorized Supply Company of Arizona, and were manufactured by the Bush Manufacturing Company of West Hartford, Connecticut.

Further alleges that the said refrigeration coils were by their very nature inherently dangerous to person or property.

V.

As part of the contract of purchase of said refrig-

eration coils, the third-party defendant, Authorized Supply Company of Arizona, represented and warranted to the Arizona York Refrigeration Company and to Southern Arizona York Refrigeration Company that the said refrigeration coils were reasonably fit for the purposes for which same were manufactured and designed, to wit: to operate as an integral part of a refrigeration system and properly and safely carry and contain the refrigerant, which said warranty is also by the usage of trade annexed to the sales of like items.

Arizona York Refrigeration Company expressly and by implication, made known to third-party defendant the particular purpose for which said goods were required, to wit: installation in and operation as an integral part of a refrigeration room and system for Swift and Company at 950 East 17th Street, Tucson, Arizona, and Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company relied on the skill and judgment of third-party defendant, the latter thereby warranting that the said goods were reasonably fit for such purpose.

Under the said contract of purchase, third-party defendant expressly and impliedly warranted against defects all goods, equipment and materials furnished by them to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.

VI.

Any damage to plaintiff, Swift and Company, or to its property, personal or real, was the direct and

proximate result of the breach by Authorized Supply Company of Arizona of the aforesaid warranties.

VII.

Third-party plaintiff, Southern Arizona York Refrigeration Company, has succeeded to all rights, claims and causes of action heretofore existing in Arizona York Refrigeration Company arising out of the aforesaid purchase of refrigeration coils from Authorized Supply Company of Arizona.

The aforesaid warranties, express and implied, from third-party defendant, Authorized Supply Company of Arizona, have been assigned and inure to the benefit of third-party plaintiff, Southern Arizona York Refrigeration Company, by law, and said third-party plaintiff, Southern Arizona York Refrigeration Company is a proper party and a real party in interest to assert any and all of the aforesaid warranties against third-party defendant, Authorized Supply Company of Arizona.

Further alleges that the cause or causes of action existing against third-party defendant Authorized Supply Company of Arizona for breach of warranties, express and implied, have been assigned and transferred to third-party plaintiff Southern Arizona York Refrigeration Company for a good and valuable consideration, and third-party plaintiff is a proper and real party in interest to assert all said claims or causes of action against third-party defendant, Authorized Supply Company of Arizona.

VIII.

In the alternative, alleges that any and all damage sustained by Swift and Company, as more particularly alleged in the Amended Complaint on file herein, was sustained as a direct and proximate result of the negligence of Authorized Supply Company of Arizona, said negligence arising out of the acts and omissions of said third-party defendant and/or its agents or employees in connection with the improper handling of and/or negligent failure to inspect and discover that said equipment was in a defective and dangerous condition, same being by its nature inherently dangerous to person and property.

IX.

If the Southern Arizona York Refrigeration Company is held responsible or liable to the plaintiff, Swift and Company, said liability and responsibility arose out of the conduct and acts or omissions of the third-party defendant, Authorized Supply Company of Arizona, and the Southern Arizona York Refrigeration Company is entitled to be indemnified for any recovery that may be had against it, together with the expenses of defending this action.

Wherefore, Southern Arizona York Refrigeration Company demands judgment against the third-party defendant, Authorized Supply Company of Arizona, for all the sums that may be adjudged against the Southern Arizona York Refrigeration Company, in favor of the plaintiff, Swift and Company, together with all costs and expenses, including attorneys'

fees, incurred herein, and for such other relief as the Court may deem proper.

Count Two

Comes now Arizona York Refrigeration Company and for its Complaint against Authorized Supply Company of Arizona, an Arizona corporation, third-party defendant, alleges as follows:

I.

Arizona York Refrigeration Company re-alleges each and every allegation contained in paragraphs I, II, III, IV, V, VI and VIII inclusive of Count One of the Second Amended Third-Party Complaint and adopts same by reference as if fully set out herein.

II.

If the Arizona York Refrigeration Company is held responsible or liable to the plaintiff, Swift and Company, said liability and responsibility arose out of the conduct and acts or omissions of the third-party defendant, Authorized Supply Company of Arizona, and the Arizona York Refrigeration Company is entitled to be indemnified for any recovery that may be had against it, together with the expenses of defending this action.

Wherefore, Arizona York Refrigeration Company demands judgment against the third-party defendant, Authorized Supply Company of Arizona for all the sums that may be adjudged against the Arizona York Refrigeration Company, in favor of the plaintiff, Swift and Company, together with all costs

and expenses, including attorney's fees, incurred herein, and for such other relief as the Court may deem proper.

DARNELL, HOLESAPPLE,
McFALL & SPAID,
/s/ By RICHARD C. BRINEY,
Attorneys for Defendants and Third-Party Plaintiffs Southern Arizona York Refrigeration Company and Arizona York Refrigeration Company.

Notice of Mailing Attached.

[Note: Amended Complaint attached hereto is the same as set out at pages 3-6.]

[Endorsed]: Filed March 7, 1958.

[Title of District Court and Cause.]

ANSWER TO THIRD-PARTY COMPLAINT

The Third-Party Defendant, Authorized Supply Company of Arizona, answers the Third-Party Complaint as follows:

Count One

I.

It admits the allegations of Paragraphs I, II, and III.

II.

It denies the allegations of Paragraph IV, except that it admits that the coils referred to were manufactured by Bush Manufacturing Company of West Hartford, Connecticut.

III.

Admits that it knew the purpose for which the coils referred to were intended to be used, and denies every other allegation of Paragraph V; and denies every allegation of Paragraph VI.

IV.

Is without information sufficient to enable it to form a belief as to the truth of the allegations of Paragraph VII, and hence denies them; and denies every allegation of Paragraphs VIII and IX.

V.

Denies every allegation of Count One not expressly admitted.

VI.

States affirmatively that the Third-Party Plaintiffs have hitherto conclusively barred themselves from maintaining this Third-Party Complaint by a binding and executed election of remedies.

VII.

States that Count One pleads no claim against Third-Party Defendant for which relief can be granted.

Count Two

I.

To the extent that matters set out in Count One of the Third-Party Complaint are incorporated by reference in Count Two, Third-Party Defendant adopts his answers to those matters as set out above and incorporates them herein by this reference.

II.

Denies every allegation of Count II, Paragraph II.

III.

States affirmatively that the Third-Party Plaintiffs have hitherto conclusively barred themselves from maintaining this Third-Party Complaint by a binding and executed election of remedies.

IV.

States that Count Two pleads no claim against Third-Party Defendant for which relief may be granted.

MAY, LESHER & DEES,
/s/ By ROBERT O. LESHER,
Attorneys for Third-Party
Defendant.

Notice of Mailing Attached.

[Endorsed]: Filed March 7, 1958.

[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED COMPLAINT

Come now the defendants and answer the Amended Complaint on file herein as follows:

I.

Adopt by reference the whole of their Answer to Amended Complaint filed on or about March 3, 1958, including the whole of their First Defense and Second Defense, and incorporate same in this, their

Amended Answer to Amended Complaint, as if same were fully set out herein.

II.

As a further and separate defense to Counts One, Two and Three of plaintiff's Amended Complaint, allege that the plaintiff has heretofore conclusively barred itself from maintaining this action and the Amended Complaint by a binding and executed election of remedies.

DARNELL, HOLESAPPLE,
McFALL & SPAID,
/s/ By RICHARD C. BRINEY,
Attorneys for Defendants.

Notice of Mailing Attached.

[Endorsed]: Filed May 13, 1958.

In The District Court of the United States
For The District of Arizona

MINUTE ENTRY OF FRIDAY, JUNE 6, 1958

May 1958 Term (Tucson Division) At Tucson.

Honorable James A. Walsh, United States District Judge, Presiding.

[Title of Cause.]

This case comes on regularly for pre-trial hearing this day. Richard Evans, Esq., and B. G. Thompson, Jr., Esq., appear for the plaintiff. Richard G. Briney, Esq., appears for the defendants.

Counsel stipulate that the following exhibits may be marked in evidence on trial:

Plaintiff's exhibits 1 to 8, inclusive, defendants' exhibits A to R, inclusive, and third-party defendant's exhibits A to E, inclusive. Plaintiff's exhibit 2 will be admitted without concession by the defendants or third-party defendant that it establishes the proper measure of damages for meat products lost or damaged. Plaintiff's exhibits 6, 7, and 8 will be admitted subject to proof that work, or expenditure, was necessary by ammonia escape.

Counsel stipulate that additional hauling charges cost Swift & Company $143. plus, subject to proof that it was incurred by reason of a breach of warranty; the same stipulation is made as to $109. plus handling charged within the plant.

It is stipulated that following the loss, the defendants, or one of them, replaced the two units without charge to Swift & Company.

In The District Court of the United States
For The District of Arizona

MINUTE ENTRY OF TUESDAY,
JUNE 10, 1958

May 1958 Term (Tucson Division) At Tucson.

Honorable James A. Walsh, United States District Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this day before the Court sitting without a jury. Richard

Evans, Esq., and B. G. Thompson, Jr., Esq., appear as counsel for the plaintiff; Richard C. Briney, Esq., appears as counsel for the defendants and third-party plaintiffs; and Robert O. Lesher, Esq., appears as counsel for the third-party defendant.

All parties announce ready for trial.

The following exhibits are admitted in evidence with reservations as to certain exhibits as stipulated to at the pre-trial hearing:

Plaintiff's exhibit 1, Articles of Agreement.

Plaintiff's exhibit 2, Tally List.

Plaintiff's exhibit 3, Letter from Swift & Company.

Plaintiff's exhibit 4, Invoices.

Plaintiff's exhibit 5, Invoice.

Plaintiff's exhibit 6, Invoice.

Plaintiff's exhibit 7, Invoice.

Plaintiff's exhibit 8, Invoice.

Defendants' exhibit A, Agreement.

Defendants' exhibit B, Minutes of meeting of Directors.

Defendants' exhibit C, Photograph.

Defendants' exhibit D, Photograph.

Defendants' exhibit E, Photograph.

Defendants' exhibit F, Photograph.

Defendants' exhibit G, Photograph.

Defendants' exhibit H, Photograph.

Defendants' exhibit I, Photograph.

Defendants' exhibit J, Photograph.

Defendants' exhibit K, Photograph.

Defendants' exhibit L, Ledger sheet.

Defendants' exhibit M, Photostat of letter.

Defendants' exhibit N, Photostat of confirmation invoice.

Defendants' exhibit O, Photostat of letter.

Defendants' exhibit P, Photostat of letter.

Defendants' exhibit Q, Letter.

Defendants' exhibit R, Letter.

Third-party defendant's exhibit A, Photostat of invoice.

Third-party defendant's exhibit B, Photostat of invoice.

Third-party defendant's exhibit C, Photostat of letter.

Third-party defendant's exhibit D, Photostat of letter.

Third-party defendant's exhibit E, Photostat of letter.

Plaintiff's Case:

Harry Robertson is sworn and examined on behalf of the plaintiff.

The following plaintiff's exhibits admitted in evidence:

9, Photostatic copy of bid.

10, Photostatic copy of specifications.

The following witnesses are sworn and examined on behalf of the plaintiff:

Frank Rosinski.

Victor James Andrews.

Plaintiff's exhibit 11, Tally of Items, is admitted in evidence.

A. C. Black is sworn and examined on behalf of the plaintiff.

Counsel for the plaintiff moves to dismiss Count 3 of the Complaint.

And thereupon, at 12:00 noon, It Is Ordered that the further trial of this case is continued to 1:30 p.m., this date, to which time all parties and counsel are excused.

Subsequently, at 1:30 p.m., all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Victor James Andrews, heretofore sworn, is recalled and further examined on behalf of the plaintiff.

Plaintiff's exhibit 12, cancelled checks, is admitted in evidence.

Harry Robertson, heretofore sworn, is recalled and further examined on behalf of the plaintiff.

Whereupon, the plaintiff rests.

Richard C. Briney, Esq., counsel for the defendants, moves for judgment in favor of the defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company and against the plaintiff Swift & Company. Said motion is duly argued by respective counsel, and

It Is Ordered that said defendants' motion for judgment is denied.

Defendants' Case:

The following witnesses are sworn and examined on behalf of the defendants:

Maurice D. Gerhart.

Lee Gideon.

Harry Robertson, heretofore sworn, is recalled and further examined on behalf of the defendants.

P. Z. Ray is sworn and examined on behalf of the defendants.

The following defendants' exhibits are admitted in evidence:

S, Deposit Slip.

T, Minutes of Board of Directors dated August 3, 1955.

U, Minutes of Board of Directors dated September 1, 1955.

V, Assignment.

W, Letter.

X, Letter.

Y, Letter.

AA, Waiver of Lien.

AB, Statement.

AC, Statement.

Z, Photostat of letter.

AD, Notes of P. Z. Ray.

Whereupon, the defendants rest.

Robert Lesher, Esq., counsel for the third-party defendant, moves for judgment on the Third-Party Complaint in favor of the third-party defendant, and

It Is Ordered that said Motion is denied.

Counsel for the defendants now moves for judgment for the defendants against the plaintiff, and

It Is Ordered that defendants' motion for judgment is denied.

Thereupon, the third-party defendant rests.

All parties rest.

It Is Ordered that the plaintiff is allowed 15 days in which to file its brief; the defendants are allowed 15 days thereafter to answer and to open as

to the third-party defendant; and the third party defendant is allowed 15 days within which to answer, and 10 days thereafter is allowed all counsel to file their final briefs. Upon the filing of said final briefs, the matter will stand submitted and by the Court taken under advisement.

In The District Court of The United States
For The District of Arizona

MINUTE ENTRY OF THURSDAY,
SEPTEMBER 4, 1958

May 1958 Term (Tucson Division) At Tucson.
Honorable James A. Walsh, United States District Judge, Presiding.

[Title of Cause.]

The Court finds the issues made by the complaint and answers in favor of the plaintiff and against the defendants and concludes that plaintiff is entitled to judgment against defendants in the sum of $9,175.29; and the Court finds the issues made by the third party complaint and the answers thereto in favor of the third party plaintiff Southern Arizona York Refrigeration Company and against third party defendant and concludes that third party plaintiff Southern Arizona York Refrigeration Company is entitled to judgment over against third party defendant in the sum of $9,175.29.

Counsel for plaintiff will prepare, serve and lodge proposed findings of fact, conclusions of law and judgment.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 10th day of June, 1958 before the Court sitting without a jury, Boyle, Bilby, Thompson & Shoenhair appearing as counsel for the plaintiff; Darnell, Holesapple, McFall & Spaid appearing as counsel for the defendants and third party plaintiffs Arizona York Refrigeration Company, a corporation and Southern Arizona York Refrigeration Company, a corporation; and May, Lesher and Dees appearing as counsel for third party defendant Authorized Supply Company of Arizona, a corporation.

And the cause being tried on the basis of plaintiff's amended complaint and defendants' amended answer to plaintiff's amended complaint, third party plaintiff's second amended third party complaint and third party defendant's amended answer to third party plaintiff's second amended complaint,

And the Court having heard the testimony and having examined the proofs offered by the respective parties,

And the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. Plaintiff is a corporation duly organized and

existing under the laws of the State of Illinois and a citizen of the State of Illinois. Defendants and third party plaintiffs are corporations duly organized and existing under the laws of the State of Arizona and citizens of the State of Arizona. Third party defendant is a corporation duly organized and existing under the laws of the State of Arizona and a citizen of the State of Arizona.

2. The amount in controversy in the above entitled cause exceeds, exclusive of interest and costs, the sum of $3,000.

3. Prior to May 31, 1955 plaintiff and defendant Arizona York Refrigeration Company entered into negotiations concerning the sale and installation by defendant Arizona York Refrigeration Company to plaintiff of certain refrigeration equipment for use by plaintiff at its plant located at 950 East 17th Street, Tucson, Pima County, Arizona.

4. In the negotiations, plaintiff made known to defendant Arizona York Refrigeration Company the particular purpose for which the refrigeration equipment was required, viz: to refrigerate and freeze meat products stored in plaintiff's plant; and plaintiff relied upon defendant Arizona York Refrigeration Company's recommendation, skill and judgment with respect to the refrigeration equipment to be furnished by said defendant to plaintiff.

5. On or about May 31, 1955, and as a result of such negotiations, plaintiff and defendant Arizona York Refrigeration Company entered into a writ-

ten contract whereunder defendant Arizona York Refrigeration Company, as Contractor, agreed to provide all the materials and to perform all the work for the installation of a complete, fully automatic refrigeration system for plaintiff's plant hereinbefore mentioned; that it is expressly provided in said contract:

"That the design, materials, and workmanship, of the machinery and all parts of the plant furnished and installed by the Contractor, shall be first-class in every respect, and suitable for the purpose intended.

"That all parts furnished by Contractor are to operate and perform their functions properly and prove durable in reasonable service.

"No payment in part or in whole shall be construed as a waiver of any guarantees of this contract."

6. Subsequent to May 31, 1955, defendant Arizona York Refrigeration Company purchased from Third Party Defendant two pieces of refrigeration equipment known as Bush coils. Before purchasing said coils, defendant Arizona York Refrigeration Company made known to Third Party Defendant the particular purposes for which said Bush coils were required, viz: to refrigerate and freeze meat products stored in plaintiff's plant. In purchasing said Bush coils from Third Party Defendant, defendant Arizona York Refrigeration Company relied upon the recommendation, skill and

judgment of Third Party Defendant with respect to said Bush coils.

7. In the negotiations leading up to the making of the contract referred to in Paragraph 5 hereof, and in entering into said contract, both plaintiff and defendant Arizona York Refrigeration Company understood and contemplated that if the refrigeration system covered by their contract failed to operate efficiently and properly, as intended by the parties, loss and damage to meat products stored in plaintiff's plant would be the natural and probable consequence of the failure of such refrigeration system. When defendant Arizona York Refrigeration Company purchased from Third Party Defendant the Bush coils described in Paragraph 6 hereof, both Arizona York Refrigeration Company and Third Party Defendant understood and contemplated that if said Bush coils failed to operate efficiently and properly, as intended by the parties, loss and damage to meat products stored in plaintiff's plant would be the natural and probable consequence of the failure of such coils.

8. Subsequent to May 31, 1955, the defendant Arizona York Refrigeration Company proceeded with the work of installing the refrigeration system in plaintiff's plant, as provided by the contract referred to in Paragraph 5 hereof. On or about September 1, 1955, the defendants entered into an agreement between themselves whereunder, inter alia, defendant Arizona York Refrigeration Company assigned all of its rights under the contract

referred to in Paragraph 5 hereof to defendant Southern Arizona York Refrigeration Company, and Southern Arizona York Refrigeration Company assumed the rights and liabilities of Arizona York Refrigeration Company under said contract. Thereafter Southern Arizona York Refrigeration Company completed the installation of the refrigeration system in plaintiff's plant. The Bush coils referred to hereinbefore were installed as a part of the refrigeration system.

9. On or about December 5, 1955, because of defects in one of the Bush coils furnished plaintiff by defendant Arizona York Refrigeration Company, large quantities of ammonia gas escaped from the refrigeration system in plaintiff's plant and permeated various portions of plaintiff's plant, thereby contaminating and damaging large quantities of plaintiff's meat products stored in the plant.

10. Subsequent to December 5, 1955, Third Party Defendant furnished defendant Southern Arizona York Refrigeration Company with new Bush coils of an improved design to be substituted for the defective Bush coils then installed in plaintiff's plant. Thereafter, defendant Southern Arizona York Refrigeration Company removed the Bush coils originally installed in plaintiff's plant and substituted the new Bush coils in their stead.

11. None of the parties to such substitution arrangements (neither plaintiff, nor Southern Arizona York Refrigeration Company, nor Third Party Defendant), intended by such arrangements to effect

a rescission of any of the agreements between them.

12. By an agreement dated about September 1, 1955 and by assignment dated January 16, 1958, defendant Arizona York Refrigeration Company assigned all of its claims against Third Party Defendant to defendant Southern Arizona York Refrigeration Company.

13. As a direct and proximate result of the ammonia leak from the defective Bush coils plaintiff incurred damages in the sum of $141.60 for processing and sorting contaminated products; $320.10 for storage, transportation and handling of meat products during the period required to effect repairs to the defective equipment; and damages for meat products destroyed, less the salvage value determined upon the basis of sales price less the expense which plaintiff would have incurred in selling the meat products had they been marketed in the regular way, being the gross sum of $9,292.23 less $578.64 selling expense or a net for the meat products destroyed in the sum of $8,713.59, making a total damage sustained by plaintiff in the sum of $9,175.29.

Conclusions of Law

From the foregoing facts, the Court concludes:

1. This Court has jurisdiction of the parties to this action and jurisdiction of the subject matter of this action.

2. Defendant Arizona York Refrigeration Company expressly warranted to plaintiff that the re-

frigeration system installed in plaintiff's plant was constructed of durable and sound materials and that said system was fit and suitable to safely and efficiently refrigerate and freeze meat products stored by plaintiff in said plant. Defendant Arizona York Refrigeration Company also impliedly warranted to plaintiff that said refrigeration system was reasonably fit and suitable to safely and efficiently refrigerate and freeze meat products stored by plaintiff in its plant.

3. Third Party Defendant impliedly warranted to defendant Arizona York Refrigeration Company that the Bush coils originally furnished by Third Party Defendant to Arizona York Refrigeration Company were reasonably fit and suitable to safely and efficiently carry out their functions as a part of the refrigeration system installed in plaintiff's plant.

4. The defects in the Bush coils which caused the escape of ammonia gas into plaintiff's plant on or about December 5, 1955, constituted a breach of the express and implied warranties mentioned in Paragraph 2 of these Conclusions of Law. The same incident constituted a breach of the implied warranty described in Paragraph 3 of these Conclusions of Law.

5. In permitting the substitution of the new Bush coils in its plant, plaintiff did not thereby elect a remedy for its loss sustained by reason of the breach of the warranties made to it by defendant Arizona York Refrigeration Company. In ac-

cepting the new Bush coils from Third Party Defendant, Southern Arizona York Refrigeration Company did not elect a remedy for its loss sustained by reason of the breach of the implied warranty made to it by Third Party Defendant.

6. Plaintiff is entitled to judgment against defendants Arizona York Refrigeration Company, a corporation and Southern Arizona York Refrigeration Company, a corporation, in the sum of $9,175.29, together with its costs of suit incurred herein.

7. Third party plaintiff Southern Arizona York Refrigeration Company is entitled to judgment over against Third Party Defendant Authorized Supply Company of Arizona, a corporation, in the sum of $9,175.29, together with its costs of suit incurred herein.

Dated: September 18, 1958.

/s/ JAMES A. WALSH,
Judge.

Notice of Mailing Attached.

[Endorsed]: Filed September 18, 1958.

In The District Court of the United States
For The District of Arizona

No. Civ. 909-Tuc.

SWIFT AND COMPANY, a corporation,
Plaintiff,

vs.

ARIZONA YORK REFRIGERATION COMPANY, a corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a corporation,
Defendants and Third Party Plaintiffs,

vs.

AUTHORIZED SUPPLY COMPANY OF ARIZONA, an Arizona corporation,
Third Party Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 10th day of June, 1958 before the Court sitting without a jury, Boyle, Bilby, Thompson & Shoenhair appearing as counsel for the plaintiff, Darnell, Holesapple, McFall and Spaid appearing as counsel for the defendants and third party plaintiffs Arizona York Refrigeration Company, a corporation and Southern Arizona York Refrigeration Company, a corporation, and May, Lesher and Dees appearing as counsel for third party defendant Authorized Supply Company of Arizona, a corporation,

And the cause being tried on the basis of plaintiff's amended complaint and defendants' amended

answer to plaintiff's amended complaint, third party plaintiff's second amended third party complaint and third party defendant's amended answer to third party plaintiff's second amended complaint.

And the Court having heard the testimony and having examined the proofs offered by the respective parties,

And the cause having been submitted to the Court for decision, the Court being fully advised in the premises,

Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

1. That plaintiff be and it is hereby awarded judgment against the defendants Arizona York Refrigeration Company, a corporation, and Southern Arizona York Refrigeration Company, a corporation, in the sum of $9,175.29, together with its costs of suit incurred herein.

2. That third party plaintiff Southern Arizona York Refrigeration Company, a corporation, be and it is hereby awarded judgment over against third party defendant Authorized Supply Company of Arizona, a corporation, in the sum of $9,175.29, together with its costs of suit incurred herein.

Done In Open Court this 18th day of September, 1958.

/s/ JAMES A. WALSH,
Judge.

Notice of Mailing Attached.

[Endorsed]: Filed September 18, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Swift and Company and its attorneys, Boyle, Bilby, Thompson and Shoenhair, Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company and their Attorneys, Darnell, Holesapple, McFall & Spaid.

Please take notice that the Third Party Defendant, Authorized Supply Company of Arizona, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the findings of fact, conclusions of law, and judgment against it entered herein on the trial of the action.

MAY, LESHER & DEES,
/s/ By ROBERT O. LESHER,
Attorneys for Third Party
Defendant.

[Endorsed]: Filed October 16, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That Authorized Supply Company of Arizona, an Arizona corporation, being the Third Party Defendant in the above entitled action as Principal, and Hartford Accident and Indemnity Company, authorized and qualified to be and become surety on judicial bonds within the State of Arizona, as surety, are held and firmly bound unto the plaintiff

in the above entitled cause in the sum of Two Hundred Fifty ($250.00) Dollars, lawful money of the United States, for which payment well and truly to be made, we bind ourselves and our successors, or assigns, jointly and severally, firmly by these presents.

Signed and dated this 15th day of October, 1958.

The Condition of the above obligation is such that, whereas the above named Third Party Defendant did on the 17th day of October, 1958, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered against it in the above entitled action on the 18th day of September, 1958, in favor of the defendants and against said Third Party Defendant, and from the whole thereof

Now Therefore, if the said Authorized Supply Company of Arizona, principal, shall pay all costs which may be adjudged or awarded against it in the appeal, if the appeal is dismissed or the judgment is affirmed or modified then this obligation to be void, otherwise to be and remain in full force and effect.

AUTHORIZED SUPPLY COMPANY OF ARIZONA,
/s/ By ROBERT MAY,
Its Attorney.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,
/s/ By ALLEN [Illegible],
Attorney-in-fact.

[Endorsed]: Filed October 16, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Arizona York Refrigeration Company, a corporation, and Southern Arizona York Refrigeration Company, a corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the findings of fact and conclusions of law, and the final judgment in favor of the plaintiff and against the said defendants, entered in this action on September 18, 1958.

Dated this 17th day of October, 1958.

DARNELL, HOLESAPPLE,
McFALL & SPAID,
/s/ By RICHARD C. BRINEY,
Attorneys for Defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That we the undersigned jointly and severally acknowledge that we and our personal representatives are jointly bound to pay to Swift and Company, a corporation, plaintiff, the sum of Twelve Thousand and No/100 Dollars ($12,000.00).

The condition of this bond is that whereas the

defendants have appealed to the Court of Appeals for the Ninth Circuit from the judgment of this court, in favor of the plaintiff and against the defendants Arizona York Refrigeration Company, a corporation, and Southern Arizona York Refrigeration Company, a corporation, entered September 18, 1958, if these defendants shall pay the amount of the final judgment herein if their appeal shall be dismissed or the judgment affirmed or modified together with all costs that may be awarded, then this bond is void, otherwise to be and remain in full force and effect.

Signed and Executed this 17th day of October, 1958.

ARIZONA YORK REFRIGERATION COMPANY, a corporation,
SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a corporation,
/s/ By RICHARD C. BRINEY,
Their Attorney,
Principal.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
/s/ By BERNARD J. SERWAITE,
Its Attorney in Fact,
Surety.

Approved this 17th day of October, 1958:
/s/ JAMES A. WALSH,
Judge.

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

STIPULATION OF CONTENTS OF RECORD ON APPEAL

It is hereby stipulated between counsel that the record on appeal, in the appeals of the defendant, Southern Arizona York Refrigeration Company, and of the Third Party Defendant, Authorized Supply Company, shall consist of the following:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Amended Answer to Amended Complaint.
4. Second Amended Third Party Complaint.
5. Answer to Third Party Complaint, filed on or about March 6, 1958.
6. Findings of Fact and Conclusions of Law.
7. Judgment entered and filed September 18, 1958.
8. Notice of Appeal, filed by Third Party Defendant Authorized Supply Company.
9. Bond on Appeal, filed by Third Party Defendant Authorized Supply Company.
10. Notice of Appeal, filed by defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.
11. Supersedeas Bond, filed by defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.
12. This Stipulation of Contents of Record on Appeal.
13. Transcript of Evidence and proceedings at the trial.

14. All minute entries.
15. All exhibits in evidence.

Dated this 14th day of November, 1958.

BOYLE, BILBY, THOMPSON & SHOENHAIR,
/s/ By B. G. THOMPSON, JR.,
Attorneys for plaintiff.

DARNELL, HOLESAPPLE, McFALL & SPAID,
/s/ By RICHARD C. BRINEY,
Attorneys for defendants and Third Party Plaintiffs.

MAY, LESHER & DEES,
/s/ By ROBERT O. LESHER,
Attorneys for Third Party Defendant.

[Endorsed]: Filed November 17, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of the said Court, including the records in the case of Swift & Company, a corporation, plaintiff, versus Arizona York Refrigeration Company,

a corporation, et al., defendants and third-party plaintiffs, versus Authorized Supply Company of Arizona, an Arizona corporation, third-party defendant, numbered Civil-909 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that the said original documents, and said copies of the minutes entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Stipulation of Contents of Record on Appeal filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Plaintiff's Amended Complaint.

2. Defendants' Answer to Amended Complaint.

3. Defendants' Second Amended Third-Party Complaint.

4. Third-Party Defendant's Answer to Third-Party Complaint.

5. Defendants' Amended Answer to Amended Complaint.

6. Minute entry of June 6, 1958 (pre-trial hearing).

7. Minute entry of June 10, 1958 (proceedings of trial).

8. Plaintiff's original exhibits Nos. 1 to 12, inclusive; defendants' original exhibits A to AD, inclusive; and third-party defendant's original exhibits A to E, inclusive.

9. Minute entry of September 4, 1958.

10. Findings of Fact and Conclusions of Law.

11. Judgment.

12. Third-Party Defendant's Notice of Appeal.

13. Third-Party Defendant's Bond for Costs on Appeal.

14. Defendants' Notice of Appeal.

15. Defendants' Supersedeas Bond.

16. Stipulation of Contents of Record on Appeal.

17. Reporter's Transcript of Evidence and Proceedings at the Trial.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of $3.60 and that sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court at Tucson, Arizona, this 28th day of November, 1958.

[Seal] WM. H. LOVELESS,
Clerk,
/s/ By ERMELIA COLE,
Deputy Clerk.

In The District Court of The United States
For The District of Arizona

No. Civ. 909 Tucson

SWIFT & COMPANY, Plaintiff,

vs.

ARIZONA YORK REFRIGERATION COMPANY, also known as SOUTHERN ARIZONA YORK REFRIGERATION COMPANY,
Defendant and Third Party Plaintiff,

vs.

AUTHORIZED SUPPLY COMPANY OF ARIZONA, an Arizona corporation,
Third Party Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances: Messrs. Boyle, Bilby, Thompson & Shoenhair, By Mr. Richard Evans and Mr. B. G. Thompson, Jr., For the Plaintiff. Messrs. Darnell, Holesapple, McFall & Spaid, By Mr. Richard Briney, For the Defendant and Third Party Plaintiff. Messrs. May, Lesher & Dees, By Mr. Robert Lesher, For the Third Party Defendant. [1]*

The Above Entitled Matter came up for trial on the 10th day of June, 1958, at the hour of 9:30

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

o'clock a.m., at Tucson, Arizona, before The Honorable James A. Walsh, Judge, and the following proceedings were had, to-wit:

The Clerk: Civil 909, Swift & Company, Plaintiff versus Arizona York Refrigeration Company, also known as Southern Arizona York Refrigeration Company, Defendant and Third Party Plaintiff, versus Authorized Supply Company of Arizona, an Arizona corporation, Third Party Defendant. For trial.

The Court: Is the plaintiff ready?

Mr. Evans: The plaintiff is ready.

The Court: Defendant ready?

Mr. Briney, Yes, sir.

The Court: The Third Party Defendants ready?

Mr. Lesher: Yes, sir.

The Court: May I have the pre-trial memorandum. Pursuant to the pre-trial, I will direct the Clerk at this time to mark in evidence Plaintiff's Exhibits 1 through 8, inclusive, 2 being admitted without concession by the defendant or third party defendant, that it establishes the proper measure of damages for the meat products lost or damaged; and 6, 7 and 8 being admitted subject to proof that [2] the work or expenditure to which the exhibits are related was rendered necessary by ammonia escape. The Clerk is further directed to mark in evidence at this time Defendant's Exhibits A through R, inclusive; and to mark in evidence Third Party Defendant's Exhibits, Authorized A through Authorized E, inclusive, both of those.

Mr. Evans: I believe too, if the Court please,

that we have a copy of specifications that bear the date February 18, 1955, and have a pencilled notation on the front: "As copy, original bid set before modification." With an initial there, whose I don't know. Mr. Briney has a set of specifications that are dated June 1, 1955. I believe that it would be in order to mark and admit both copies of the specs, so that if there are any substantial changes in them that those will be made apparent to the Court. From a cursory examination or comparison of the two I don't believe there is anything any different in the two of them that has any appreciable bearing on the issues in this case. There are some different types of equipment specified, different capacity and so on. Am I correct, substantially?

Mr. Briney: I confess I have never seen, other than here this morning, Mr. Evans' offer. I do have specifications with attached equipment lists, dated June 1, 1955. It is my understanding they were submitted after the job had been bid and begun. Mr. Evans is correct, just comparing paragraphs, [3] the terms of the specifications appear the same on the two instruments, but I haven't read them word for word. The equipment lists are different to some extent. Subject to adequate foundation from the plaintiff that his exhibit constitutes the specifications under which the job was bid or begun, I would not object to the offer for whatever it might show, and I would be willing to have marked in evidence the specifications marked June 1, 1955. I don't think I could stipulate as to all of the reasons for the change or to what extent the

job was done in detail on each particular set. I would be willing to offer them as such to have them marked.

The Court: Right now you are insisting Mr. Evans lay a foundation, so I guess we might as well take that that way.

Mr. Evans: That is going to be a little difficult to do, because the architect that drafted the specifications is not available. We will have to try to do it another way through either Mr. Robertson or Mr. Ray of the Arizona York Company.

The Court: I don't understand that you have to produce the architect who wrote them.

Mr. Evans: He also is the gentleman who, on behalf of the plaintiff, entered into the contract of which the specifications were made a part.

The Court: My understanding would be a foundation would be somebody who could testify definitely that these are [4] the specifications that were in existence and to which the contract related on the date the bid was made or the work was done. I mean they must be tied to Exhibit 1.

Mr. Evans: Yes.

The Court: But that doesn't have to by the architect.

Mr. Evans: No, I know that. I will have to do it through one of the officers of the defendant. So I guess we might as well get at it. Call Mr. Robertson for cross examination under the Statute.

HARRY ROBERTSON

called as a witness herein, having been first duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Evans): State your name, please.

A. Harry Robertson.

Q. What is your occupation, Mr. Robertson?

A. I am manager of Southern Arizona York.

Q. Calling your attention, Mr. Robertson, to May 31 of 1955, what was your employment at that time?

A. At that time I was manager of Arizona York.

Q. For its Tucson operation?

A. For its Tucson operation. [5]

Q. In connection with your employment by Arizona York in May, 1955, did you have occasion to execute a contract with Swift & Company?

A. Yes, I negotiated that contract.

Q. I hand you Plaintiff's Exhibit 1 in evidence and ask you if that is a copy, true copy of the agreement that was entered into by you on behalf of Arizona York and Swift & Company on or about May 31, 1955?

A. There is no question about the sheets to which I have signed my name.

Q. Is there any question in your mind about the others? A. There is no initials or anything.

Q. Mr. Robertson, I hand you Plaintiff's Exhibit 9, marked for identification, and ask you if that is a true copy of the specifications which were

(Testimony of Harry Robertson.)

referred to in the contract of May 31, 1955, consisting of 10 pages?

A. This is supposed to be the original specifications?

Q. Yes, sir.

A. I will say it is at least similar.

Q. At least similar. Let me ask you this, Mr. Robertson, between the time that you first started negotiating to do this job and the time that the job was actually commenced, there were some modifications or changes made in the specifications, were there not? A. That is correct. [6]

Q. Most of those, if not all of the changes, were in the equipment that was to be used, isn't that also correct?

A. There were some changes in the design also in connection with that.

Q. What I am getting at is, there was no change made in the so-called general conditions that are in the first five or six pages of the specifications?

A. That is correct.

Q. Where the changes came were in the so-called equipment list and in design? A. Yes.

Q. I hand you the Plaintiff's Exhibit 10, marked for identification, and ask you if that is a correct copy of the specifications as modified and in accordance with which the job was done?

A. Yes, that is right.

Q. So that the actual agreement or agreements under which your job was done for Swift & Company consisted of the Plaintiff's Exhibit 1, being

(Testimony of Harry Robertson.)

the original contract, and Plaintiff's Exhibit 10, being the specifications bearing date June 1, 1955?

A. I should state that the original specifications were after we estimated the job and the second set of specifications, I have made no definite word to word comparison of them, but they asked us that we return them based on suggested changes, [7] which were mutually agreed upon, as far as the design and nature of equipment.

Q. Right. But the job definitely did go ahead in accordance with the modified specifications dated June 1, 1955?

A. Other than with revisions as accepted by their superintendent.

Q. As you went along on the job?

A. As we went along.

Mr. Evans: We offer in evidence, if the Court please, Exhibits 9 and 10.

Mr. Briney: I have no objection.

Mr. Lesher: Your Honor, may I address a question to counsel?

The Court: Very well.

Mr. Lesher: It isn't contended, is it, that Authorized Supply had anything to do with the contract of which these specifications are a part?

Mr. Evans: No, sir.

Mr. Leshner: I have no objection.

The Court: 9 and 10 will be received.

(Plaintiff's Exhibits 9 and 10 marked in evidence.)

Mr. Evans: That is all the questions we have, Mr. Robertson. [8]

FRANK ROSINSKI

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Evans): Please state your full name and where you live, Mr. Rosinski.

A. Frank Rosinski, 4815 East 4th.

Q. Here in Tucson?

A. That is right, sir.

Q. What type of employment do you engage in?

A. Superintendent before. I am saleman now.

Q. You are salesman for whom?

A. Swift & Company.

Q. Back in 1955 were you employed by Swift & Company? A. I was.

Q. In what capacity at that time?

A. Superintendent.

Q. Superintendent of what?

A. Of the plant, sales unit.

Q. And the plant is located where?

A. 950 East 17th Street, Tucson, Arizona.

Q. How long have you been in the employ of Swift & Company continuously? [9]

A. Approximately 29 years.

Q. Now, were you the superintendent of this plant which was outfitted by either Arizona York Company or Southern Arizona York Company in 1955? A. Yes, sir, I was.

Q. And do you recall approximately when that job was completed by the York people?

A. No, I don't.

(Testimony of Frank Rosinski.)

Q. Would you generally describe to the Court what the plant consists of, of which you had supervision?

A. Well, I had charge of all operations in the plant, which was the meat cutters, the floor help and the trucks, and the coops.

Q. On the morning, or calling your attention to the morning of December 5th of 1955, did you go to work on that day? A. I did.

Q. Do you recall the approximate time of day you went to work?

A. Approximately at 5:00 a.m.

Q. Do you recall the day of the week that this December 5th was on?

A. It was on a Monday.

Q. Had the plant been in operation over the week-end? A. No, it hadn't. [10]

Q. When had it been closed down as far as employees were concerned?

A. Friday evening.

Q. So there had been nobody working around there between Friday evening and when you got there Monday morning? A. No, there hadn't.

Q. Is that true? A. Yes, sir.

Q. When you arrived at work on the morning of December 5th, what did you find, if anything?

A. On Monday the 5th of December, the four men I had to unload trucks, they came on at 4:00 o'clock in the morning and they in turn have found that the ammonia leak has occurred; they in turn called me at my home at 4815 East 4th and I in

(Testimony of Frank Rosinski.)

turn come to the plant. And after looking over the plant, seeing it was full of ammonia, I called Lee Gidden of the Southern Arizona York, or the Arizona York at that time, I imagine. And while waiting for him I went in with a water saturated handkerchief over my mouth and my nose—I couldn't get to the ammonia mask, which was about five feet from the door. And I tried to open up all the doors to let the ammonia evaporate or escape from the building.

Q. The room you first went into, does it have some kind of descriptive name?

A. Yes, it is the dry storage area. [11]

Q. In that dry storage area or dry storage room, was there any piece of refrigerating equipment?

A. The only thing that was there is the machinery itself, but nothing that was refrigerated in the dry storage area.

Q. Let me show you the Defendant's Exhibit E in evidence, and ask you if that shows a part of the so-called dry storage room?

A. No, this is not the dry storage area.

Q. What area is that?

A. This is the area in the big cooler, which is leading out from the freezer itself. The freezer is to the left of this cooler.

Q. Now, take a look at Defendant's Exhibit J in evidence, and tell us what that is?

A. This is the ammonia condenser coils that are in the freezer itself that refrigerate the freezer room.

(Testimony of Frank Rosinski.)

Q. Is that where the ammonia came from?

A. Well, yes. This is the unit. There are two units in there.

Q. It was either that unit or one identical to it?

A. That is right, sir.

Q. Where was the unit that had leaked the ammonia located, was it in the freezer room or dry storage room? A. It was in the freezer room.

Q. In the freezer room itself? [12]

A. That is right.

Q. What do you keep in the freezer room?

A. All items of frozen stage that have to be kept frozen at all times.

Q. What does Defendant's Exhibit F show us?

A. This is the storage room for carcass, beef, veal and lamb, and also our cutting operations and area where the orders themselves are put in for delivery.

Q. Will you tell us, Mr. Rosinski, in what areas of the Tuscon plant that morning did you find ammonia fumes?

A. It was through the entire building.

Q. What does the building consist of other than the dry storage unit of the freezer room and of the carcass storage and cutting area?

A. There is the offices. They were quite saturated too, which no one could stay in them either.

Q. In other words, the ammonia had infiltrated—— A. Throughout the entire building.

Q. ——throughout the entire building?

A. That is right, sir.

(Testimony of Frank Rosinski.)

Q. How long was it before you were able to get the ammonia cleared out of the building?

A. It has been sometime ago; to the best of my knowledge is possibly was the second or the third day.

Q. Now, with respect to the various meat products, such [13] as your carcasses and frozen foods and so-called dry storage products, were they affected by the ammonia? A. Yes, they were.

Q. What did it become necessary to do?

A. Well, it was necessary to dispose of it at the best price where it could be sold, such as to the tallow company, which no one else was able to buy, because it wasn't fit to be consumed.

Q. That was because of the ammonia that had penetrated into the product?

A. That is right, sir.

Mr. Evans: That is all.

Cross Examination

Q. (By Mr. Briney): Mr. Rosinski, when you went in the building early that morning, you went into where the freezer room was too, did you not?

A. No, I didn't.

Q. When did you first get to the freezer room?

A. I myself, I believe it was the second or third day. I am not sure. After I had made a loan of some ammonia masks from the Fire Department, I believe it was the second or third day before I was able to get in there.

Q. The first morning when you went in, did you

(Testimony of Frank Rosinski.)

[14] observe the condition of the door to the freezer room that opened out to the rest of the building?

A. I did not. I did not get in that far.

Q. When did you first observe the condition of that door?

A. Again I will say the second or third day.

Q. Was the door open or closed when you saw it?

A. I don't remember. I don't remember if it was open or closed.

Q. As a matter of fact, it was wide open, wasn't it? A. I don't know, sir, for sure.

Q. I hand you Defendant's Exhibit 10 in evidence and ask you if that doesn't show the door to the freezer room from the outside?

A. That is right, sir.

Q. Do you think you could come down on the blackboard and for the benefit of the Court show the outside perimeter of the building, show the freezer room in relation to the building, offices and so forth? A. You mean sketch it out?

Q. Could you do that?

A. I am not that good an artist.

Q. I don't want you to be an artist, I want you to show the Court where the freezer room is in relation to the cold storage area and the offices and so forth. Just a line drawing. Explain it as you go. Could you stand to one side [15] a little bit?

A. This is the entrance to the building and down through this area here is the offices. And right through here is the big—this is a chicken cooler here. And right in this corner here, this is the freezer

(Testimony of Frank Rosinski.)

area, this is the cooler space where hanging beef is and this is provisions such as pork and butter and items that are being used in the refrigerated area too. But this right here——

Q. Mark "freezer room".

A. (Witness indicates)

Q. How about the direction, could you put the directions north and south on there?

A. This would be south.

Q. Outside of the building?

A. This would be south of the building.

Q. From what you have marked, you mean freezer there? A. Yes.

Q. That is on the south?

A. South wall. Not entirely to the wall, but about the middle of it.

Q. Would you indicate the cold storage area you referred to originally? A. Cold storage?

Q. Yes. A. This is entire cold storage. [16]

Q. Mark it "cold storage".

What about the offices, Mr. Rosinski?

A. These are the offices here. This is the manager's office.

Q. Mark all of them.

A. And this is salesmen's office and this is the bookkeeper's office.

Q. The other areas you have partitioned off to indicate what they are?

A. This is the poultry cooler.

Q. And the other two areas?

A. This is dry storage.

(Testimony of Frank Rosinski.)

Q. The one other area? A. This here?

Q. Yes.

A. This is still the dry storage. This is wide open all the way through.

Q. Where is the front door of the place?

A. Right here. It is on the northeast corner of the building.

Q. Where in the freezer room were the coils that held the ammonia?

A. They were on the east end of the wall and hanging above it, hanging from above on the east end of the building.

Q. In the freezer room? [17]

A. That is right.

Q. Could you mark where they would be?

A. Right here. There was one about here and the other right about here.

Q. Why don't you mark each of those "coils". I think you said there were some frozen foods stored in the freezer room?

A. All frozen foods are in there.

Q. Roughly what area?

A. The entire area.

Q. The coils are all sealed?

A. That is right.

Q. The hanging meat shown in some of the exhibits was generally placed where?

A. In this cold storage. That was all in this area right here.

Q. Exhibit E in evidence is a picture showing what area?

(Testimony of Frank Rosinski.)

A. This is the back area right here. That would be the north end. That was where we kept our butter and cheese. This was the north wall.

Q. And Exhibit F showing hanging meat, I take it, is also in the cold storage area?

A. That is right, that would take in from about half of the building there to the south.

Q. Were you ever present, Mr. Rosinski, when any tests [18] were made by Southern Arizona York or any of the York people, or any of their insurance adjusters or by Mr. Gearhart? Were you there when the coils were tested?

A. I have. I haven't seen the actual tests, but I was there when they started the tests.

Q. That was about when in relation to the morning you came into the plant?

A. I couldn't say. I don't remember.

Q. Several days or a week?

A. It could be, but I don't remember just when.

Q. You can step back here, Mr. Rosinski.

Calling your attention again to the door of the freezer room, where is the door to the freezer room?

A. That would set right in the center, that would be the door.

Q. Somewhere about here (indicating)?

A. That is right.

Q. That is the door shown in Exhibit D in evidence, right? A. That is right.

Q. Let me ask you again, taking you back a couple of years, what is your recollection of whether

(Testimony of Frank Rosinski.)

that door was open or closed when you first saw it after the leak occurred?

A. As I say, I don't remember whether it was open or closed. It probably might have been open, I don't know. I [19] don't remember that far back.

Q. Tell me if this is true. Isn't it true the door was open about 18 inches, it apparently had been jarred open or loose?

A. At that time I don't know, but we have had, as I recall, some time that it had been the vacuum built up in the cooler has caused the door to open.

Q. It is possible that door was open?

A. I wouldn't say for sure. I don't know, as I said.

Q. If, Mr. Rosinski, the leak had been confined, the ammonia had stayed within the freezer room, you agree, would you not, there would not be damage to meats and products outside the freezer room?

Mr. Evans: We object to that as calling for an opinion, speculative, calling for a conclusion of the witness.

The Court: It hasn't been shown he is qualified.

Q. (By Mr. Briney): In any event, when you got on the premises that morning there was ammonia everywhere and it is possible the door was open at that time to the freezer room?

A. Again I say I don't know. I wasn't in there.

Q. It could be though. Tell me about, was there any rubber flap of any kind at the bottom of the door which prevented the door from making a perfect seal?

(Testimony of Frank Rosinski.)

A. I have never checked that door that close, sir.

Q. Prior to the day or the morning of the trouble, can [20] you tell me whether or not you folks had had any trouble keeping that door closed?

A. I don't remember. Let's see, I don't know for sure. I don't know whether it was before or after, but Lee Gideon called that the door had been opening. I don't know whether it was before that or after, I don't know that, I can't say.

Q. Isn't it true, Mr. Rosinski, that you had had this door come open, and as I understand it, the door swings into the cold storage area?

A. Yes, out.

Q. It opens out from the freezer room?

A. Yes.

Q. You can open the door from inside the freezer room? A. Yes.

Q. What was the method of opening the door, what kind of latch, from the freezer room?

A. You had a handle that you pushed out.

Q. To get in from the outside?

A. You pulled it out, pulled it toward you.

Q. Isn't it true, sir, on at least three other times prior to December 4 and 5, 1955 that this door had opened by itself, hadn't it come open at least three other times, the dates being November 1st, November 18th and November 29 of the same year?

A. I don't remember. It is like I said before, it was [21] before or after, which it is, I can't say. I don't remember that far back. Whenever it

(Testimony of Frank Rosinski.)

occurred I called this Lee Gideon on it, so if that would be the case, it would be a date to that effect.

Q. Who installed the door?

A. I don't know.

Q. Arizona York or Southern Arizona had nothing to do with the installation of the door, did they? A. I don't know.

Q. You were plant superintendent at the time this occurred?

A. Not when it was being built. I had nothing to do with the building. I was just in charge of the operations of the employees.

Q. Do you know who built the building?

A. Sundt Construction.

Q. Didn't he also put the door in?

A. I don't know.

Q. In the freezer room?

A. I don't know.

Q. What was the difference between this particular door and the type doors you had had other experience with in freezer installations?

A. There again I don't know. The doors we had at the other place were all the same type door. [22]

Q. As this door?

A. I mean they were doors that opened up the same as we have in the plant. I don't know anything different. I don't know anything about refrigerator doors or freezer doors.

Q. Do you remember back on December 9th, 1955, some four days after this occurrence at the Swift plant where Mr. J. Snoke and Mr. Fred

(Testimony of Frank Rosinski.)

Baker, who sits here taking notes, came out and took your statement? A. That is right.

Q. Mr. Snoke asked you questions and Mr. Baker wrote them down? A. That is right.

Q. Let me ask you if these questions were asked at that time and the answers given:

"Question: What machines were those—" The preceding questions deal with your calling Mr. Gideon, your coming in Monday morning at a quarter to 5:00. "—the first thing I did was check the machines in the back."

"Question: What machines were those?

"Answer: Compressors. When we seen that wasn't the case we opened the cooler doors and when it hit us in the face we couldn't stand it and then got the ammonia masks and tried to get in there and it was too strong to get in there then.

"Question: Who was the one that found the door to the freezer room open? [23]

"Answer: I was.

"Question: It was standing open?

"Answer: Yes, jarred open, loose.

"Question: How far was it open?

"Answer: About 18 inches.

"Question: That was the night the whole thing was pushed back?

"Answer: Yes.

"Question: Could you see the leak?

"Answer: I couldn't tell you because I couldn't get in. We didn't go in there that morning. That

(Testimony of Frank Rosinski.)

was the second morning we went in to find out in that way."

Do you remember those questions and your answers to that effect?

A. I remember being questioned, but I don't remember exactly.

Q. You would not disagree that was your statement at that time?

A. If that was the time Mr. Snoke and that, that was probably what I answered, yes, sir.

Q. Let me ask you whether these questions weren't asked and you gave these additional answers:

"Question: When was the first time you knew the door was standing open?

"Answer: We didn't know that until we got in the cooler. [24] That was probably Tuesday morning.

"Question: No other employee had gotten to the door before you got there?

"Answer: No, no one could have.

"Question: No one opened the door?

"Answer: No."

In regard to the question I asked a little while ago, whether the door opened on prior occasions, let me ask you if you weren't asked these questions and gave these responses at the time Mr. Baker transcribed them:

"Question: Did you ever have any previous trouble with that coil unit before this—" I am

(Testimony of Frank Rosinski.)

wrong, Mr. Rosinski, when I told you those dates those doors were open. Those were other leaks. I am in error when I indicated the door had been open on three other specified occasions.

These questions were asked and did you give these answers:

"Question: Did you ever have any trouble with that door before blowing open, the freeze door, the freeze room door?

"Answer: It always done that since this blower was in there. I had never seen anything like that happen before.

"Question: It is unusual?

"Answer: That is right, it is. In this old place we had it but it never opened up for us. Whether or not those four fans in there, I don't know whether that caused it, or what [25] caused it.

"Question: Sundt is the one that built this building?

"Answer: That is right, sir."

Do you remember those questions and answers concerning the door? A. Yes, I think I did.

Q. Did you ever notify Sundt you were having trouble with that door?

A. Again I will say I don't remember whether I did or didn't.

Q. Did you call the attention of one Mr. Bessmeyer to the fact the door had been open on prior occasions, had come open by itself?

A. As I say, I don't remember if I did. I probably did call him. I don't remember.

(Testimony of Frank Rosinski.)

Q. As a matter of fact, they had made some readjustments on the door?

A. I don't remember that either.

Q. Even after the trouble on the 4th and 5th of December, 1955, the same thing occurred in regard to the door opening?

A. I don't remember that.

Q. I understand it has been quite awhile. Let me ask you if this question was asked and you gave this answer:

"Question: Did you ever notify him you had trouble with the door? [26]

"Answer: That is right. Sundt was here to install a swinging door in the back of the cooler, which we replaced by Burton, something like that, doors. At the same time I called attention of Mr. Bessmeyer about the door being open, he said he would take care of that. So a man had readjusted it over again but it still done the same thing."

Would that be the best of your recollection your statement at that time?

A. That is possible.

Q. I take it you don't know what caused that door to come open? A. No, sir, I don't.

Q. The night of the 4th of December or morning of the 5th? A. No, sir, I don't know.

Q. Can you give me any idea in dollars and cents what the value of the products inside the freezer room was at that time?

A. I couldn't say, sir, I had nothing to do with

(Testimony of Frank Rosinski.)

the prices or anything at the time. I wouldn't know anything about it.

Q. You still have the same door on that freezer room? A. Yes, we have.

Q. You haven't replaced the door?

A. No, sir, not to my knowledge. [27]

Q. What, sir, was your relationship, if any, to the contract negotiations between Arizona York and Swift & Company? A. I had none.

Q. Who handled that for Swift?

A. I believe the man—I am not sure. I couldn't say because I don't remember. I had nothing to do with the contract negotiated, I don't know who did that, truthfully.

Q. How about Mr. Christianson?

A. He, as I understand, was the construction superintendent.

Q. Did he live in Tucson or sent in?

A. He was sent in from Chicago.

Q. He was here, I take it, at the time the job was bid and thereafter until when, the conversion was made? A. Yes, I presume so.

Q. He was the one that had dealings with the people that installed the freezing equipment?

A. I think so.

Q. Would you have any personal knowledge, Mr. Rosinski, as to what changes were made in the original plans and specifications or contract during the process the York people installed the refrigeration equipment? A. No, sir.

(Testimony of Frank Rosinski.)

Q. You wouldn't know whether they were orally agreed [28] upon changes, or whether they would be in writing, or what? A. No, sir, I don't.

Q. Do you think Mr. Christianson would be the man that would know the most about that?

A. I don't know that, sir.

Q. You wouldn't have any knowledge about the particular coils called for under the contract being placed in the freezer room, what changes might have been made in them, anything like that?

A. No, sir.

Q. Do you recollect, Mr. Rosinski, at any time in the neighborhood of September 1, 1955, receiving a notification from Southern Arizona York Refrigeration Company that they were taking over the business formerly done or handled by Arizona York Refrigeration Company?

A. No, sir, I didn't.

Q. Could there have been such notification come in at that time and you not see it?

A. Possibly could have been, but I had nothing to do. I did not receive any mail to that effect or anything. It would be the manager or someone.

Q. Who was the manager at the time?

A. Mr. Craig.

Q. He would more than likely be the one that would be familiar? [29]

A. If he received the mail, he would be the one, I don't know.

Q. Do you know anything about any correspondence from your company to Southern Arizona

(Testimony of Frank Rosinski.)

York? A. No, sir.

Q. In connection with this job or completing it, paying for it, or anything like that?

A. No, sir.

Q. You didn't have anything to do with the correspondence on that particular thing?

A. No, sir, I didn't.

Q. Was there any practice of Swift & Company to inspect its plant over week-ends at that period of time? A. Well, not necessarily.

Q. Was there a practice or not?

A. No, it never had been and it wasn't necessary unless it was somebody like myself, if I wanted to go there, which I did sometimes on Sundays. I would go to church and drop down for a minute or so, but that Sunday I did not do it.

Q. Would you know, sir, whether there were service calls during the six or eight months after this leak and the damage occurred, by the York people, Southern Arizona York in connection with the installation?

A. Well, I can't answer that. I don't remember just when it was. There were calls made, but I don't know whether before [30] or after. I know there were several calls made.

Q. Some service done? A. That is right.

Q. Lee Gideon, was he involved in any of that work?

A. I believe Lee was the one taking care of it most of the time.

Q. And he was employed—do you know who he

(Testimony of Frank Rosinski.)

was employed by? A. Yes, Arizona York.

Q. You don't know at what time he would have been employed by Southern Arizona as against Arizona York? A. No, sir, I wouldn't.

Q. In any event, he was the man that had something to do with the job to some extent before December 1st, 1955 when they first started the installation and he was there on some occasions after that time?

A. I don't know just when, but he was there.

Q. Did you see any testing done on the coils in the freezer room after the damage had occurred?

A. The best of my knowledge, I remember somebody coming down there, but who they were, I didn't watch it. I had started to, but I was called away and I didn't finish watching it.

Q. Did they take the coils down to do those tests, either or both coils? [31]

A. They took the one down.

Q. Do you know whether that was the north or south coil? A. I don't remember, sir.

Q. Do you know of your own personal knowledge what the result of the tests was as to what the cause of the leak was, do you know what determination was made at that time?

A. They were saying, but I don't remember now what it was. I can't say for sure, because I don't know the terms of refrigeration.

Q. Did you see any pictures taken at that time, Mr. Rosinski?

A. I don't remember. There were pictures taken,

(Testimony of Frank Rosinski.)

but I don't know whether they were taken of that particular coil or not. I don't know.

Q. Do you know a Red Butler?

A. No, sir, I don't. I don't remember the name. I know there were several people there.

Q. How about Tony Mitchell? Do you know a Tony Mitchell? A. No, sir, I don't.

Q. Do you have any knowledge, Mr. Rosinski, as to what became of the two coils in the freezer room, the ones that were there at the time the leak occurred, do you know what became of them?

A. No, sir, I don't. [32]

Q. Were you present when any installation of other coils was made after that occurrence?

A. I was there and showed them what was there and what they wanted to know, and that was it. I walked away from it. They put in the necessary coils or took out the necessary coils.

Q. This was the latter part of December, 1955?

A. I don't know exactly, but it could have been that date.

Q. Let me ask you if this would refresh your recollection. Isn't it true about December 27th or 28th, 1955, some three weeks after the incident you originally described happened, there were new coils brought in and placed in the position indicated in the diagram in the freezer room?

A. Again I will say I do not remember.

Mr. Briney: No further questions.

Mr. Lesher: No questions.

(Testimony of Frank Rosinski.)

Redirect Examination

Q. (By Mr. Evans): I take it, that prior to this occurrence over the week-end in December, 1955 there had been previous leaks in this same equipment?

A. Yes, there had. And we had a grand opening which we had to have Lee Gideon there all the time we had this grand [33] opening. I don't remember what day it was, but he was there all day long.

Q. Taking care of the leaks in the unit?

A. That is right.

Mr. Evans: That is all.

Recross Examination

Q. (By Mr. Briney): Lee Gideon was present then each time these leaks had occurred, to your knowledge? A. That is right.

Q. He was the man that came out when the call was made to York? A. That is right.

Q. I take it, you don't have any more personal knowledge about the cause of those leaks than you do about the leak in question?

A. No, sir, I do not.

Q. There was no damage done to the Swift products during the time several leaks occurred before December 4th, was there?

A. Not to my knowledge.

Q. They occurred, as a matter of fact, when somebody was at the plant?

A. That is right. [34]

Q. The person noticing the leak immediately

(Testimony of Frank Rosinski.)

contacted York? A. That is right.

Q. Now, did Swift undertake any inspection of its plant over week-ends after it had knowledge there had been three prior leaks?

A. I don't remember now exactly whether there was or not. I can't say that. As I said, several times I went down there, but I didn't go especially just to see if there was any such things as that necessary.

Q. It is probably true, notwithstanding there had been several leaks before December 4th, 1955, no regular practice of checking and inspecting on the condition of the refrigeration system was made over week-ends or holidays, would that be true?

A. I don't remember that.

Mr. Briney: Nothing further.

Mr. Lesher: Nothing, your Honor.

Redirect Examination

Q. (By Mr. Evans): Are you familiar with the dates on which these previous leaks occurred?

A. No, I don't have them, that I remember of.

Mr. Evans: That is all. [35]

VICTOR JAMES ANDREW

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Evans): Will you tell us your full name? A. Victor James Andrew.

Q. What is your occupation?

(Testimony of Victor James Andrew.)

A. I am office manager of Swift & Company of the Tucson Sales Unit.

Q. How long have you been in the employ of Swift & Company?

A. It will be ten years this coming July.

Q. I take it then you were in the employ of Swift & Company in the year 1955?

A. I was.

Q. And were you here in Tucson with Swift & Company in 1955? A. I was.

Q. What was your job at that time?

A. Office manager.

Q. Same job. Can you recall the incident over the weekend in December when the ammonia leak occurred at the plant?

A. I recall coming to work and all the boys were outside [36] and there was a very strong odor of ammonia. We went into our offices; there was two people or one person working with me at the time we went into our offices, and as I recall, you just couldn't work in there, it was so saturated with ammonia. So we went out to his house and worked for that day. I believe it was just that one day.

Q. What was done, if you know, Mr. Andrew, with the various products that were stored in the various areas of the plant which were exposed to the ammonia?

A. They were segregated physically, as I recall.

Q. Segregated physically as to what was contaminated and what was not?

A. Actually I don't recall too well, but I don't

(Testimony of Victor James Andrew.)

believe we could get any good product into the cold storage, I am speaking of now, and of course the product that was in there at the time of the leak had to be segregated and evaluated.

Q. Was there an inventory made of that product?

A. There was a count made, yes, sir.

Q. What was done with the product that was contaminated by the ammonia fumes?

A. A small portion of it was sold at the best price we could get from local jobbers and the rest was given to the bone men—I say given, I think it is half a cent a pound we got for it.

Q. You mean the tallow plant? [37]

A. That is right.

Q. From the inventory that was taken following this incident and the records of the company, did you prepare a tally of the items that had been sold or dumped from this ammonia break and setting up the price of it and the amount of it and coming up with a figure showing the money that was involved as a result of this loss? A. I did.

Q. I am going to hand you the Plaintiff's Exhibit 2, which is in evidence, subject to the objections, or as to relevancy, and ask you to tell us what that exhibit represents, Mr. Andrew?

A. This exhibit represents all merchandise that was damaged by ammonia and either had to be given to the bone man or else sold at a very low price to local jobbers.

Q. All right. Now, where it shows the price on

(Testimony of Victor James Andrew.)

the exhibit, what price is that, what does that represent? A. That is selling price.

Q. Selling price to whom?

A. To the retail customers.

Q. To the retailers?

A. To the retailers.

Q. At our request, Mr. Andrew, have you calculated the difference between the selling price as it appears on Plaintiff's Exhibit 2 and what the cost price of those various [38] items had been to you people? A. I have.

Q. Handing you Plaintiff's Exhibit 11, I ask you first of all, if it is a true copy of Plaintiff's Exhibit 2, as far as the typewritten portions of it are concerned? A. It is.

Q. Now, have you indicated on the Plaintiff's Exhibit 11 the difference between the cost and selling price of this merchandise? A. I have.

Q. Tell us just briefly in your own words how you have done that?

A. I took, each month we make a business statement and we divided our sales down by caption, that is, beef, lamb, pork, et cetera, and the previous month I took our experience on our earnings, which is reflected in per hundredweight figures. For example, beef is a big item, and our earnings as shown by our business statement was 77 cents a hundredweight. And that was the element of profit that I deducted from the previous exhibit, I forget the number.

(Testimony of Victor James Andrew.)

Q. 2. You deducted that from the so-called selling price as shown on the other exhibit?

A. That is right, to arrive at a cost.

Q. You have done that on each of the items shown on the two exhibits? [39]

A. That is right.

Mr. Evans: We offer in evidence Plaintiff's Exhibit 11, if the Court please.

Mr. Lesher: Your Honor, might I ask a question of the witness on voir dire?

The Court: Yes.

Q. (By Mr. Lesher): Calling your attention to Exhibit 11 and the pencilled notation in the amount of $103.16 on page 2, do I understand from what you have testified that that figure $103.16 represents what you calculate to be your profit on $5336.00 worth of beef?

A. That is based on our previous months' earnings on beef, yes, sir.

Q. Do you have any knowledge, sir, of what this beef or what any of this meat actually cost Swift & Company?

A. Why, sure. When you say Swift & Company, what do you mean?

Q. Is your Tucson operation an independent corporation? A. No, sir, it isn't.

Q. I mean by that then, by my question, I mean, do you know what this meat which is listed on here cost the corporation which is called Swift & Company and which is the plaintiff in this lawsuit?

A. No.

(Testimony of Victor James Andrew.)

Mr. Lesher: I will object on the ground it is [40] irrelevant.

Q. (By Mr. Evans): Do those exhibits reflect the cost of the product and the selling price of the product as far as the Tucson Sales Unit of the Swift & Company is concerned? A. It does.

Q. Do each of the various sales units in the different cities operate as an independent operation of the Company? A. That is right.

Q. And keep separate books of account?

A. We account for our own profit and losses.

Q. Only? A. Yes.

Mr. Briney: May I ask a few questions on voir dire?

The Court: Surely.

Q. (By Mr. Briney): The items that are shown on Exhibit 2, Mr. Andrew, can you tell me who sold your company the beef, for instance, listed on the exhibit, what is the name of your seller?

A. Who sold to us?

Q. Yes.

A. Well, the greater majority of this product I would guess came from Denver. They are our principal supplier.

Q. That is Swift & Company?

A. Swift & Company, Denver.

Q. Division Two? [41]

A. Yes. It is in the Swift & Company organization, the plant.

Q. Does Tucson pay Swift in Denver?

A. In a manner of speaking. We are invoiced

(Testimony of Victor James Andrew.)

and we have to pay through accounting. It is book transactions.

Q. And the other items, variety meat, bacon, hams, sausage, butter, et cetera, you buy that also from another division of the Swift & Company, do you? A. Yes, we draw everything in here.

Q. Those divisions from Swift from which you make the purchase also have a mark up figure, do you know, in their operation?

A. I couldn't answer that.

Q. Perhaps to be a little repetitious, would I be correct, sir, that referring to the meat and totals on page 2, for a total weight of 13,397 pounds of beef, Swift & Company, Tucson, had a mark up of a total of $103.16 with regard to its sales of this material to retail outlets?

The Court: What do you mean by mark up?

Mr. Briney: Profit.

A. Well, there is a lot of things to consider in that. For example, there is a shrink factor. Maybe you have held the beef three or four days more than you normally should have. That cuts into your earnings. Maybe the market dropped on a particular cut. There is no fixed margin that you can set [42] up. You have to do the best you can. Sometimes you fare better, sometimes you fare less.

Q. Let's take the first item under beef: S.P.?

A. Sweet pickled tongue.

Q. The retail price listed is 35½c a pound, is that right? A. Yes.

(Testimony of Victor James Andrew.)

Q. What did you pay the supplier to you for that product per pound?

A. I would be just guessing.

Q. What guess would you give me?

A. I would say on that particular item about 4 cents a pound. That draws a pretty good profit. You see, that comes in and is sold just as it is, it isn't cut or processed or anything.

Q. What is the 4 cents you are guessing there, you mean you paid 31½ per pound and going to sell it for 35½?

A. That is what I would guess, yes.

Q. You would get quite a different figure on cost, if you multiplied that by pounds on each of these items?

A. You are just picking the one item.

Q. That is right.

A. That is sweet pickled tongue. The preponderance of this list is carcass beef, cut beef.

Q. Let me take you down to one item—I am getting [43] into cross examination.

The Court: I think you are, Mr. Briney.

Mr. Briney: I will object to the offer, absolutely no foundation. It is immaterial.

The Court: May I see it, please? May I see both of them?

The objection will be overruled. It will be received as 11 in evidence.

(Plaintiff's Exhibit 11 marked in evidence.)

Q. (By Mr. Evans): Mr. Andrew, in addition to the damage that was done to these various meat

(Testimony of Victor James Andrew.)

products which you have itemized on the exhibits, was there any damage done to the building itself as a result of this ammonia leak of December 5, 1955?

A. As I understand it, the walls in the freezer room were contaminated with ammonia and as a result they broke down.

Q. And as a result of the walls breaking down, was there additional repair work that had to be performed to put the walls back in condition?

A. Yes, there was.

Q. I hand you Plaintiff's Exhibit 6, and ask you tell us what that represents?

A. Well, I am not too familiar with this stuff, but it was used in the refinishing of the freezer room. [44]

Q. Refinishing a room that had been damaged by the—— A. Ammonia, yes.

Q. That was some material that was used by the contractor that finally did the job?

A. Correct.

Q. Looking here at Plaintiff's Exhibit 7, tell me if that is the repair bill for the contractor that actually did the repair work? A. It is.

Q. And looking at No. 8, Plaintiff's Exhibit 8, I ask you if those are invoices covering the storage charges of meat products at Arizona Ice & Cold Storage during the time the repairs were being made on the freezer room? A. It is.

Mr. Evans: We offer in evidence 6, 7 and 8.

The Court: Those are already in, Mr. Evans.

(Testimony of Victor James Andrew.)

Mr. Evans: I thought those were some they had raised objection to.

The Court: No, they are already admitted subject to the showing of necessity for the expenditure.

Mr. Evans: I misunderstood. If my memory was correct that 3, 4 and 5, there was no objection to those and no necessity for additional foundation, is that correct?

Mr. Lesher: That was my understanding. [45]

The Court: We will take the morning recess at this time.

(Recess.)

(After Recess.)

Mr. Evans: Am I correct in my presumption that at the pre-trial it was charges for hauling and handling during the repairs to the freezer were agreed to, 138.12 and 109.21?

The Court: With the reservations that I announced when we first started this morning, those were the only reservations that I knew were made about any exhibit that was marked.

Mr. Evans: We have no further questions of Mr. Andrew.

Cross Examination

Q. (By Mr. Briney): Mr. Andrew, do you know a Mr. Barrett of Barrett & Holmes?

A. No, sir, I don't.

Q. Do you remember who did the original equipment rooms, who did the original finishing of the walls in the cold storage room and so forth? Would

(Testimony of Victor James Andrew.)

that have been Barrett & Holmes, the subcontractors, do you know?

A. The name is familiar, yes, sir. I wouldn't say it [46] would be, but the name is familiar.

Q. Had you observed any flaking of the finish on the walls on any of the interior walls of that building prior to December 4th, 1955?

A. No, sir.

Q. Never saw any flaking of those walls?

A. No, sir. You are talking about the freezer walls?

Q. Do I understand, sir, the materials you referred to here and the work that was done was inside the freezer room? A. Yes.

Q. Inside the freezer room did you observe, before December 4th, 1955, any flaking or breaking down of those walls? A. No, sir.

Q. Now answer me this one, from whom did Swift & Company purchase the original purchase from some person other than a Swift organization the various items listed on the tally of items marked Plaintiff's Exhibit 11, for instance? Where was the original sale and purchase?

The Court: You have asked him where other than from other Swift organizations?

Q. (By Mr. Briney): Yes. When did Swift & Company, the plaintiff in this case, first get title to the items listed on that tally?

A. Most of it I suppose would be in the stockyards. [47]

Q. You wouldn't have any idea as to any partic-

(Testimony of Victor James Andrew.)

ular item on that exhibit, where the purchase was made, from whom the purchase was made by Swift & Company?

A. I would guess at Denver, the Denver stockyards.

Q. How many Swift organizations had a hand in buying and selling after the original purchase by Swift? Do you see what I mean? You people, I understand, bought this material, a lot of it from the Denver Swift & Company? A. Yes.

Q. It is all the same corporation? A. Yes.

Q. Where would Denver get it?

A. They would buy it from the farmers.

Q. They would buy from the original producer?

A. Yes.

Q. After it purchased it at a certain price it would sell to you and perhaps other Swift Sales Divisions at other locations, right?

A. That is right.

Q. I believe you told us you don't know what might have originally been paid by Swift at Denver to the producer? A. No.

Q. The figure you have attempted to give us there in pencil as to the profit of the Tucson Division, does not include, does not reflect the difference between the cost [48] to Denver Swift of any of those items, does it, doesn't reflect that at all?

A. Not necessarily, no.

Q. In fact, you have determined the pencilled figure from some average of what your earnings were during a particular month as to a particular

(Testimony of Victor James Andrew.)

class of product? A. Yes.

Q. The fact of it is, there were two mark ups, that is, Denver sold to you at a higher figure, at a certain figure that was higher than its cost, wouldn't that follow? A. Not necessarily.

Q. It might be, as to any of the items?

A. They could have sold it at a loss.

Q. Some of them they probably sold them at a profit? A. Either way.

Q. Right? A. Either way, yes.

Q. On some of the items there may have been a loss when Denver sold to you from what they originally paid for it and the others there might have been a profit? A. True.

Q. So what the plaintiff in this case, Swift & Company's profit was by the pound on any of the items listed on Exhibit 11, you do not know?

A. The actual original cost? [49]

Q. I want to know Swift & Company's total profit per pound on any item listed on the tally.

A. I don't know that.

Q. Nor do you know Swift & Company's cost on any of the items listed by pound on the exhibit, do you? A. No.

Q. I take it these retail selling prices shown on Exhibits 2 and 11 were the prices fixed at somewhat a speculative basis, that is, if a material left your Tucson plant a week from the day this accident happened, if it hadn't occurred, that price might change, depending on the market, right?

A. Right.

(Testimony of Victor James Andrew.)

Q. It might be higher, it might be lower at the day it is sold to El Rancho, for instance?

A. Right.

Q. That would be equally true as to all of the items on the exhibits, wouldn't it?

A. Correct.

Q. How long had the Tucson Division been in business as of December 4, 1955?

A. I don't know exactly. It goes back to the turn of the century, I believe.

Q. I am not making myself clear. How long had the particular operation on 17th Street been in operation? [50]

A. I see. We moved over the Labor Day of '55.

Q. That would be in the neighborhood of September 2nd? A. First part of September.

Q. So you had been in a wholesale selling business for maybe three months at the time the loss occurred? A. Correct.

Q. Do you have any personal knowledge, Mr. Andrew, about the contractural relationships between Swift & Company and Arizona York or Southern Arizona York in connection with the refrigeration installed? A. No, sir, I don't.

Q. Do you have any personal knowledge of your own as to the cause of the ammonia leaks?

A. No, sir.

Q. Did you see any testing done or observe any testing done as to the cause? A. No, sir.

Q. Are you familiar with any of the details as

(Testimony of Victor James Andrew.)

to payments made from Swift to Arizona York or Southern Arizona York on the contract?

A. I drew the checks, but as to the details, I wouldn't feel qualified to discuss it, because we had an engineer, construction man here, and he approved the voucher. All I did was merely write the check.

Q. He was on the job, he told you what to do and you [51] did it? A. Yes.

Q. Who is he? A. Mr. Christianson.

Q. Do you know where he is now?

A. No, I understand he is retired. But I don't know where he is.

Q. And the other man in the office there in charge, his name was Craig, as I understand it?

A. Correct.

Q. I hand you Plaintiff's Exhibit 4 in evidence and ask you to look at the signatures on the back of the articles of agreement. You notice Swift & Company, on a signature E. A. Sheweiss?

A. Yes.

Q. And the initials H. C.? A. Yes.

Q. Do you know what the initials H. C. mean?

A. That is Mr. Christianson's initials underneath Sheweiss.

Q. In other words, Harold was Christianson's first name?

A. I think so. I always called him Chris.

Q. Those are his initials, H. C.?

A. I feel positive they are.

Q. Are you familiar with his handwriting? [52]

(Testimony of Victor James Andrew.)

A. Yes.

Q. That is his handwriting. E. A. Sheweiss is Christianson's handwriting, isn't it? A. Yes.

Q. Who is Sheweiss?

A. He is the head of the construction department of Swift & Company.

Q. Was he here at some time or other during construction of this new plant?

A. Not that I know of.

Q. Do you have any personal knowledge, Mr. Andrew, about the door to the freezer room that I have asked Mr. Rosinski about, as for example, do you know whether immediately after the trouble on the 4th and 5th of December, 1955, whether the door to the freezer room was open or closed?

A. I have no knowledge, or I don't recall discussing that particular part of it, but I imagine it would have been open.

Q. Do you have any personal knowledge as to any prior times when that door came open without anybody opening it?

A. Yes. I don't know about prior, but we had some difficulty with the door. It seems when the blower units would go on the doors would blast open by the pressure and the temperature within.

Q. Did you ever have any negotiation with Sundt [53] Construction Company as to altering, changing or adjusting that door? A. No, sir.

Q. Did you ever write any checks to pay them for work done in that regard?

(Testimony of Victor James Andrew.)

A. No, I don't recall any. I don't recall any work done on that door.

Q. Do you have any personal knowledge, Mr. Andrew, about whether the particular coils that were hanging from the ceiling in the freezer room on the dates I mentioned, whether they were replaced and other coils substituted at any subsequent time? A. I didn't understand the question.

Q. Do you know whether the coils in the freezer room the day of the difficulty, December 5th, 1955, do you know whether they were subsequently taken out and replaced by other coils at a later date?

A. I believe the Southern Arizona York people replaced them.

Q. They were put in and installed around the 27th and 28th of December, 1955, would that be about right, sir? A. Yes.

Q. Lee Gideon, did you happen to know him?

A. Yes.

Q. He was involved at the time the replacement was done? [54]

A. I would imagine. He was always there when there was difficulty.

Q. Wasn't he there at the times after the end of December, '55, sometime during 1956, wasn't he on the premises on service calls in connection with the refrigeration equipment?

A. I am quite sure he was.

Mr. Briney: I have nothing further.

Cross Examination

Q. (By Mr. Lesher): Mr. Andrew, calling your

(Testimony of Victor James Andrew.)

attention to the line drawing on the blackboard which was done first by Mr. Rosinski, can you recognize that as being substantially a rough line drawing of the Swift premises?

A. I think the freezer is a little off there.

Q. If you were to change it, where would you put it? A. I would center it more.

Q. Would you come down then and using dotted lines, indicate where you would put the freezer. Don't erase or disturb the present drawing any more than you have to.

A. It was more or less centrally located there (indicating).

Q. I see. So that the dotted area that you have drawn is where you think the freezer was at the time. Aside from [55] that can you orient yourself with that line drawing, does it appear to you to be substantially correct, although rough?

A. I tried to center it on there, yes.

Q. Do you know where the meat that is listed, the meat and meat products and various other items that are listed on Exhibit 11, do you know where they were located at the time they incurred the damage you complain about?

A. They were in the cold storage area and right outside the freezer there.

Q. All of the items that you have listed in Exhibit 11 were outside the freezer room proper, were they not? A. Many of the items, yes.

Q. Were there any of the items that are listed on Exhibit 11 that were not outside the freezer

(Testimony of Victor James Andrew.)

proper? A. Yes.

Q. Do you know which of the items on Exhibit 11 were inside the freezer, if any?

A. I can pick out a few.

Q. How many such items are there on Exhibit 11?

A. This is 11, I guess. Yes. There is 3200 pounds of veal rolls, that is frozen. I will pick the big items. There is a lot of small 20 and 30 pound items. There is 2450 pounds of spare ribs—make that 2500 pounds. There is 175 pounds of frozen pork tenders There is 1524 pounds of various, what we call variety meats, the offal of the [56] animal. And Brookfield sausage, I am not sure, the superintendent can tell you about that. Sometimes they freeze that item. There was 1,080 pounds of Brown and Serve, which is a very expensive item. And I know some of these poultry items were in the freezer. There is frozen fowl, there is almost 1,000 pounds of that.

Q. Substantially all of the other items on the list, which is on Exhibit 11, were stored outside the freezer room proper, is that correct, sir?

A. There was quite a bit inside the freezer.

Q. Those items you have listed?

A. Yes, sir.

Q. But the great bulk of the meat and food products that were destroyed or damaged were outside the freezer, is that right? A. Yes.

Q. Do you know at what temperature the freezer room was kept?

(Testimony of Victor James Andrew.)

A. At what temperatures it should be kept?

Q. Yes. A. No.

Q. Do you know at what temperature the so-called cold storage area was kept?

A. I think around 34 degrees.

Q. In any event, the freezer room is much colder than [57] the cold storage area?

A. Be around zero.

Q. Meat products kept in the freezer room stay frozen solid? A. Definitely.

Q. And the door to the freezer room is a large heavy refrigerator type door? A. Yes, sir.

Q. In essence, isn't it true that this so-called freezer room is a large walk-in refrigerator, freezer unit? A. That is what it is.

Q. Just like you would have in your home, in your kitchen, only much larger? A. Yes, sir.

Q. You could keep frozen products of all kinds inside of it and they would stay frozen?

A. That is correct.

Q. You said on direct examination, sir, that you understood that the walls in the freezer room, and I believe your expression was, "broken down" as a result of exposure to ammonia. From whom did you derive that understanding?

A. I don't recall.

Q. Are you yourself any kind of an expert on walls? A. No, sir, I am definitely not.

Q. Is it correct that you yourself do not have any [58] first-hand personal knowledge of what

(Testimony of Victor James Andrew.)

caused the walls to break down, is that a true statement?

A. I presumed it to be the ammonia. I mean, they all started to peel; it was after the ammonia break. It is like adding one and one together to me.

Q. The walls began to peel after the ammonia escape, so you assumed the ammonia caused the walls to peel? A. I did.

Q. But you have no actual knowledge based on your own past experience as an expert in the field to know what caused the walls to break down, do you, sir? A. No.

Q. Where are the blowers located that you referred to as having caused the freezer door to come open before this incident?

A. They are directly opposite the door. You can see them there on the diagram. I don't know whether they are in the coils, but in that general area where the coils are and blow out at the door.

Q. Are they part of the coil unit?

A. I am not an authority on that.

Q. They are inside the freezer room some place?

A. They are, yes, sir.

Mr. Lesher: I have nothing further. [59]

Redirect Examination

Q. (By Mr. Evans): Just to clear something up here, at least in my mind. Looking here at Plaintiff's Exhibit 11, you didn't acquire, for example 3.4 pounds of choice top sirloin steaks as top

(Testimony of Victor James Andrew.)

sirloin steaks from Denver, did you? A. No.

Q. In other words, you get it by the carcass?

A. That is right.

Q. Then cut it up here in Tucson?

A. That is right.

Q. At your plant? A. That is right.

Q. That is true with almost all these beef products, the lamb, the veal and the pork?

A. Not the pork, but the beef, lamb and veal is broken here at the unit.

Q. You of course are able, or rather in your operation at Tucson, keep track of the cost of taking that meat from the carcass form and getting it into steaks and chops and hamburger and so on, do you not?

A. We render profit and loss statements each month.

Q. You have employees that are paid salaries and have trucks that are operated to distribute this product, and so on? [60] A. Right.

Q. You have taken those into consideration in arriving at these profits or margin of profit that you have indicated on No. 11? A. That is correct.

Q. Am I correct that the York Company, either Arizona York or Southern Arizona, which ever it may be, also furnished and installed these blower units that set in the freezer room and blow toward the door, that was part of the job done by one of the two York companies, wasn't it?

A. Yes, that is right.

Q. In other words, they did all the refrigeration

(Testimony of Victor James Andrew.)

work there at the Tucson plant and included in it was furnishing and installation of these blower units, true? A. I believe so, yes, sir.

Q. After they were installed they were all put into so-called running condition by people from the York Company, either this Mr. Gideon——

A. Lee Gideon.

Q. Or other people? A. Yes.

Q. As a matter of fact, Mr. Gideon was around there quite a bit adjusting things and checking things after the installation was completed, is that true? A. Yes. [61]

Mr. Evans: That is all.

Recross Examination

Q. (By Mr. Briney): Mr. Andrew, this Exhibit 11, when you calculated a profit on all the first class of items, beef, 13,000 some pounds of beef, you calculated a profit of Swift on that, or your division profit was $103.16? A. Yes.

Q. What did you pay the butcher that cut up that meat per week?

A. What did we pay him?

Q. What was his salary per week?

A. At that time I guess it was about 85 a week.

Q. So he was getting 300 and what, 50 dollars a month to slice up these carcasses?

A. Yes, sir.

Q. In a month he would get two times as much as the total profit shown on the beef?

A. No. You have that wrong. That profit in-

(Testimony of Victor James Andrew.)

cludes the labor charges. That is a direct charge against the merchandise. These butchers, when they stick a knife into a piece of meat, that is a part of the cost of the meat; wrapping is a part of the cost.

Q. You add those to what you pay Denver? [62]

A. Definitely.

Q. It is bookkeeping entry, no money changes hands?

A. As far as Denver is concerned, no.

Q. After you add all the salaries, costs and packaging then you compute a figure which for that first class you figured 100 and some dollars for 13,000 pounds of beef, is that right?

A. That is right.

Q. Does the cost figure that you use to compute your profit also include your salary?

A. No. My salary is considered an expense. It is not the cost on merchandise. The butchers' salary is the cost on merchandise.

Q. How many other salaries in the Tucson division at around the time December 4th and 5th, 1955 were treated as expenses and not costs?

A. Well, it is just the butchers' salaries that are treated as costs added to the price.

Q. You would have what other people?

A. Sales personnel, delivery and accounting, those are expense items.

Q. They are not charged directly on the products? A. They are not.

Q. The salaries of those folks, I take it, are

(Testimony of Victor James Andrew.)

paid out of—the payroll comes from where, some other Swift & Company? [63]

A. No, we make our own payroll. I would like to mention that Swift & Company's earnings are available, they are public. Each years they make less than—they make a fraction of a cent on a dollar's sales. And the gross margins I show here are about 2% for beef. We have an enormous turn over, that is what makes it add up.

Q. Do you know anything about the Company's stock dividends during the year 1955?

Mr. Evans: I object to that as being immaterial.

The Court: Objection sustained.

Mr. Briney: No further questions.

Redirect Examination

Q. (By Mr. Evans): Approximately how many pounds of beef do you process through this plant every month?

A. This last month was a rather poor month; we did close to 600,000 pounds. The previous month we did about three-quarters of a million.

Mr. Evans: That is all.

Examination

Q. (By the Court): Mr. Andrew, just a minute. This Exhibit 2 has a list of all the meat products, or a lot of meat products that were [64] in the plant on December 5th? A. Yes, sir.

Q. And you have the sales price, that is the price you would have gotten if you would have sold

(Testimony of Victor James Andrew.)

those products in the regular course of business?

A. Yes, sir.

Q. Would there have been any expense in connection with getting that price, any further expense, I mean, if you had sold those in the regular course of business on the 5th, 6th or 7th, would you have had any additional expense to get that price delivery, sales, accounting?

A. Yes, your Honor, there would be.

Q. Could you calculate with reasonable certainty the amount of that additional expense—I don't mean right now. A. I believe I could.

Q. Would you do that for us, calculate the things that would have come out of that sales price as expense if this accident hadn't happened and you would have made the sales?

A. Your Honor, it might be difficult because of the time element involved. In other words, you have your expenses each day, how long would it take to sell this.

Q. Do you have delivery costs calculated on the basis of dollar sales?

A. We have it on the basis of weight. I suppose we could get it on the basis of weight. [65]

Q. See what you can do with it if you will.

A. All right, sir.

The Court: Do you have copies of that, Mr. Evans?

Mr. Evans: No, I believe those are the only two we have.

The Court: As long as you keep the exhibit in

(Testimony of Victor James Andrew.)

the courtroom, don't take it away with you. You can sit down there in the jury box and make what computations you want or memoranda you want there.

All right, Mr. Evans.

A. C. BLACK

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Evans): State your name, please, sir. A. A. C. Black.

Q. Where do you live, Mr. Black?

A. I live in Amarillo, Texas.

Q. Are you employed at the present time?

A. No, I am not.

Q. What has been your work prior to now?

A. I have been in the construction department.

Q. Of what company?

A. Swift & Company, Chicago.

Q. For how long were you employed by Swift & Company? A. Approximately 42 years.

Q. Have you retired now?

A. That is correct.

Q. During the time you were with the Company, what were your general duties?

A. Well, I remodeled plants and installed equipment and, in fact, built them and equipped them and remodeled them all over the United States and some of the foreign countries.

(Testimony of A. C. Black.)

Q. Were you still in the employ of the Company in December, 1955, Mr. Black?

A. Well, I was at that time in El Paso, at the time of this leakage.

Q. Did you come over to Tucson after being advised of this ammonia break or leak problem, whatever it was? A. That is right.

Q. Do you recall how long after the leak was discovered that you arrived here?

A. Tuesday afternoon, I think.

Q. The following afternoon? A. Yes.

Q. Can you tell us what you found when you went out to the plant? [67]

A. Everything contaminated with ammonia.

Q. Was there still ammonia in the various rooms of the building?

A. Quite a bit of it. A lot of it had evaporated due to the doors being open.

Q. Did you make an inspection of the equipment there to try to find out what had caused this ammonia to get out into the various rooms?

A. Yes, we did.

Q. Will you tell the Court what you discovered in making that investigation?

A. It was a small break in an ammonia tube in the freezing suspended unit.

Q. That is what is referred to sometimes as Busch unit?

A. Yes, Busch freezing unit, suspended freezing unit.

(Testimony of A. C. Black.)

Q. Did the Defendant's exhibit J show one of those Busch suspended units?

A. That is correct.

Q. That is one of them, is it? There were two of them in the particular freezing room?

A. There were two in the room.

Q. Can you see on any of these photographs, Mr. Black, where this leak had occurred?

A. I can't identify the exact location. However, it was at the end, I believe of the two. [68]

Q. At the end of the two. Who was there along with you when you were looking this equipment over? A. Mr. Robertson and myself.

Q. Mr. Robertson from the York Company, is that right? A. That is correct.

Q. Had he already learned what had caused this thing to happen, or were the two of you there together——

A. No, he had already been over prior to my coming into Tucson.

Q. He, of course, was the manager of the Company? A. That is right.

Q. Of the Arizona York Company or Southern Arizona? A. That is right.

Q. Did you have a conversation with him there on that occasion that had anything to do with what had happened to the machine? A. Yes.

Q. Was there anyone present besides the two of you?

A. I think Frank—what is his name, the superintendent at that time?

(Testimony of A. C. Black.)

Q. Rosinski?

A. Yes. I believe Frank was there.

Q. The three of you? A. Yes.

Q. Was that the same day you had arrived in town? [69]

A. That was Wednesday morning.

Q. The next morning? A. Yes.

Q. Will you relate the conversation you had with Mr. Robertson at the plant on that morning, that would be December 7th, I guess?

A. As I remember, Mr. Robertson and I looked at the defective equipment and I believe the conversation was that the York people would replace the unit free of charge, which I understand they did.

Q. Was there anything else said, anything about the damage to this product or anything of that nature in your conversation?

A. Well, at the same time during the conversation, as well as I remember, to my best recollection, was that Mr. Robertson made the statement that they would, their insurance company would pay for the damaged products.

Mr. Briney: Excuse me. I object to that and ask it be stricken as not responsive, immaterial and irrelevant.

The Court: The motion is denied. Objection overruled.

Q. (By Mr. Evans): Can you explain to us a little bit, Mr. Black, about these so-called blower units that are located in the freezer room?

(Testimony of A. C. Black.)

A. That particular unit I am not particularly familiar [70] with.

Q. You did observe the one that is located there?

A. That is right.

Q. What is the purpose of that, what does it do?

A. That is the mechanism that creates the refrigeration in the room.

Q. Are they big fans?

A. Yes, they have two large fans in the back and the fans blow the air directly through the tubing, which is refrigerated, and blow the air into the room.

Q. In other words, the blowers set in behind this thing? A. They are in the back.

Q. I guess this is the front? A. Yes.

Q. Sit back there and blow through?

A. Blow through. Simple.

Q. Are those blower units regulated in some manner or are they capable of being regulated?

A. That is right.

Q. What is the purpose of the regulation?

A. That is to get more temperature or less, the required temperature.

Q. You have heard the testimony here I believe, Mr. Black, or it has been mentioned to you, at least, that that cooler door or freezer door on the morning that this condition [71] was discovered was apparently open? A. Yes, sir.

Q. And from your examination of the freezer room, of the door and the blowers we had in there, can you tell us what caused that door to come open?

(Testimony of A. C. Black.)

A. Not positive,——

Mr. Briney: I object to that without some foundation. There is no showing this gentleman saw the door in any particular position or any particular time, made any investigation of the condition that existed. Nobody was there probably at the time it occurred, couldn't duplicate the condition.

The Court: I don't think sufficient foundation has been laid.

Q. (By Mr. Evans): On the occasion of your visit following the discovery of this condition, Mr. Black, did you attempt, make any effort to discover what, if anything, had caused that freezer room door to come open?

A. No, I didn't. In fact, I didn't know it existed, that trouble.

Q. You didn't know that had been open?

A. No.

Q. Okay. When this ammonia comes out of these coils, if it is confined into one room, is there a resulting increase in pressure within that room from the presence of [72] the ammonia?

A. Certainly.

Mr. Briney: I object, no foundation.

The Witness: Certainly.

Mr. Briney: No foundation at all.

Q. (By Mr. Evans): Let's go back. Mr. Black, tell the Court the training and experience you have had in working around refrigerating equipment and specifically the general type of refrigerating equipment that is installed in this Tucson unit and in

(Testimony of A. C. Black.)

buildings similar to the Tucson unit, can you do that? A. There is no difference.

Q. Tell us the experience you have had, just how much—you have been doing that for how long?

A. I have been in that end of it 32 years.

Q. 32 years? A. That is right.

Q. During that time have you had occasion to study and to observe the methods for refrigerating these kind of units? A. That is correct.

Q. Have you had occasion to study and learn and observe the effect from a great concentration of ammonia in any one room?

A. That is right.

Q. From your experience and your observations, can you [73] tell us what happens when you get an escape of a large quantity of ammonia into a closed room, as far as the pressure created in that room by the escaping ammonia?

Mr. Lesher: Your Honor, we again object on the ground there is no proper foundation laid. I wonder if I might have leave to ask a question or two on voir dire?

The Court: You may ask it.

Q. (By Mr. Lesher): Sir, do you know the pounds per square inch of pressure required to open the door in this freezer from the inside when it is closed? A. I would say about 15 pounds.

Q. You are familiar with it?

A. It isn't positive that much, but approximately.

Q. Have you ever run a test?

(Testimony of A. C. Black.)

A. Not exactly, but by pushing on the handle by hand pressure you can very well determine about how much pressure you are applying to open the door.

Q. You have never made a test to determine how much gas pressure, for example, is required to open the door?

A. It wouldn't take any more than your hand if you open it.

Q. My question, sir, you have never made the test to determine that?

A. Naturally I wouldn't have.

Q. You wouldn't know the potential gas pressure built up [74] in the room from the escape of the ammonia gas in those coils?

A. Not exactly, but I have some idea.

Q. Have you ever made any measure?

A. No, because you wouldn't go into that kind of a thing.

Mr. Lesher: We object on the ground there is no foundation.

Mr. Briney: I will join in the objection.

The Court: The objection is overruled.

(The last question was read as follows: "Question: From your experience and your observations, can you tell us what happens when you get an escape of a large quantity of ammonia into a closed room, as far as the pressure created in that room by the escaping ammonia?")

Mr. Briney: May I add that I will object, it is immaterial.

(Testimony of A. C. Black.)

The Court: Objection overruled.

Q. (By Mr. Evans): Do you have the question in mind now, Mr. Black?

(The previous question was re-read.)

Q. (By Mr. Evans): What happens, does the pressure go up? A. It goes up.

Q. Can you tell us the pressure that that ammonia was under there in those coils of that unit, do you know that? [75]

A. Normally I would say when it is operating it would be probably nothing, but as the machine shuts off the pressure builds up.

Q. Explain that to me.

A. As the room warms up the ammonia increases, which expands and creates pressure.

Q. How much pressure is created in a room approximately the same size as this freezer room?

A. It could have been as much as 40 pounds.

Q. As much as 40 pounds of pressure in there?

A. Yes.

Q. In your opinion would that be sufficient pressure to force the door of the freezer room open?

A. It could have.

Mr. Briney: I object, there is no foundation whatever. This testimony in the abstract is immaterial. There is nothing to show this gentleman knows anything about the nature of the catch on the door, the weight of the door, the pressure created inside, outside or otherwise in these particular coils. As far as we know he never looked at the coils, except by

(Testimony of A. C. Black.)

casual observation. This is a matter for expert testimony.

The Court: He testified the door would open with a pressure of 15 pounds per square inch. He says he knows that or that is his approximation of it. The answer may [76] remain.

Mr. Briney: May I ask a question on voir dire?

The Court: You can cross examine him. I am going to let him testify.

Q. (By Mr. Evans): How long were you here following this occurrence, Mr. Black?

A. About a day and a half.

Q. During the time that you were here, did you have occasion to notice if ammonia had made any change in the walls of the freezer room?

Mr. Briney: I object, no foundation, if the Court please, unless he knew something about what the walls were like before.

Mr. Evans: We have evidence in the case there was no flaking of the walls prior to this occasion.

The Court: He may answer.

Q. (By Mr. Evans): Put it this way, during the time you were here following this ammonia being loose in the freezer room, did you observe any flaking or any change in the appearance of the walls in the freezer room?

A. Just at that time, yes, it had just happened, so therefore the conditions were there, but I mean no flaking appeared. It had turned the paint yellow.

Q. It had turned the paint yellow?

A. Yes. [77]

(Testimony of A. C. Black.)

Q. But there was no apparent flaking at that time?

A. Not at that time, because it hadn't had time to disintegrate.

The Court: Mr. Black, you mean you observed the paint was yellow?

A. That is right.

Q. (By Mr. Evans): From your previous experiences, Mr. Black, can you tell us whether or not ammonia getting onto these type walls that were in this freezer room will cause a flaking of the paint?

A. It will.

Mr. Evans: That is all.

Cross Examination

Q. (By Mr. Briney): Do you know what color the walls were before this incident occurred?

A. They were white.

Q. How do you know that?

A. I was in the plant before this happened and saw the plant.

Q. In the freezer room? A. Yes.

Q. Do you know anything at all, sir, about this particular door so far as its manufacture or method by which it sealed [78] the particular freezer room?

A. They have a rubber seal and have a rubber flap at the bottom which shuts from the outside. But pressure from the inside can pass through the flap, due to the fact that the flap is setting in this position from the inside going out.

Q. The adjustment of the door, I take it, it can

(Testimony of A. C. Black.)

be adjusted, can it not, to withstand greater or less hand pressure or other pressure?

A. That is right, it has an adjustment.

Q. Do you have any knowledge of what pressure it had been adjusted to by the contractor that put the door in, prior to the incident you came to Tucson for? A. No.

Q. Therefore, you wouldn't know how it was adjusted in relation to whatever pressure might have been built up in the room from any cause?

A. No.

Q. Or how it might have been adjusted in relation to what adjustment was on similar doors from other Swift operations? A. That is right.

Q. Were you present, Mr. Black, at any time when Mr. Gerhart ran any tests on the Busch coils to determine the leak? A. No. [79]

Q. You don't, of course, have any personal knowledge whatever of the pounds pressure per square inch created within the freezer room we have been talking about was at any time before the 4th or 5th of December, 1955?

A. No, I couldn't.

Q. You have no way of knowing how much might have got out from under the seals, you wouldn't know? A. No.

Q. Your recollection I think you said was that the leak you ascertained—can you tell me which of the two coils, the north or south coil, had the leak when you observed it? A. Is this north?

(Testimony of A. C. Black.)

Q. Yes, sir.

A. I believe it was that one on the north.

Q. On the north? A. I believe so.

Q. Was it in place in the ceiling or taken down?

A. It was on the ceiling.

Q. What did you do, get upon a stepladder and look at it? A. On a ladder.

Q. Would Defendant's Exhibit J in evidence indicate the approximate manner in which that particular coil sat on the ceiling, attached to the ceiling, at that time?

A. Exactly like it shows, bolted right up to the ceiling [80] in a correct manner.

Q. Did you see any photographs taken of this equipment? A. No.

Q. Can you point out, Mr. Black, approximately where the leak was on the unit?

A. No—as well as I remember it was on the end of the coil, I am not sure.

Q. These little tubes?

A. On this tube, but I am not sure just where it was at.

Q. On Exhibit J in evidence you notice there appears to be an open end of the particular unit here? A. Yes.

Q. An upright or vertical heavy tube, then various smaller diameter tubes?

A. That is right.

Q. In relation to the heavy as against the smaller diameter tubes, where was the leak?

(Testimony of A. C. Black.)

A. It was in the smaller tubes.

Q. You have seen equipment of that kind time and time again? A. Oh, yes.

Q. What is your opinion as to whether the leak you observed was within a portion of the coil inherent in the manufacture, or whether it was in a portion of the coil that the installers would put together? [81]

A. Well, I would say this was just a defective unit. That is the only way I would know how to put it, because I wasn't here when it was put up.

Q. But the particular coils that you have referred to and shown in Exhibit J, they are not installed by the people that put the equipment in the building, are they?

A. They are put up by various different means.

Q. Looking at the particular Busch coil in the photograph, the people that install it make a connection to the wall and connect it where the ammonia goes in, right?

A. I wouldn't say about that.

Q. You don't know?

A. I don't know about that. There is different manners of putting it in.

Q. Have you ever seen leaks like that on coils before of this nature? A. Yes.

Q. In your opinion the cause of such leaks is what? A. Defective unit.

Q. Defective manufacture?

A. Defective manufacture of the unit.

(Testimony of A. C. Black.)

Q. There was no leak in any of the major couplings shown on the unit, was there?

A. Not that I know of.

Q. The only leak was actually in an aluminum small [82] diameter coil?

A. As far as I know.

Mr. Evans: If you are trying to get at any idea of any negligence on the part of your people in installing it, we don't raise that question at all. While it is pleaded in Count Three, we have no objection to Count Three going out, the negligence count. We have no reason to believe there was anything done wrong by the York people.

The Court: I take it you are dismissing Count Three?

Mr. Evans: Yes, sir. And that might save us some time.

Mr. Briney: I have nothing further.

Cross Examination

Q. (By Mr. Lesher): Mr. Black, this type of coil you have been testifying about, this Busch coil is the type which is normally used in freezer rooms?

A. That is right.

Q. This is not the type coil that is normally used in what they have called here the cold storage area?

A. No, they are two different types.

Q. You use an altogether different type?

A. That is right. [83]

Q. Swift & Company designed this arrangement

(Testimony of A. C. Black.)

here, did it not? A. That is right.

Q. The arrangement of the freezer room?

A. Yes.

Q. And in your experience a room this size, referring again to the freezer room, would need two of these coils to keep the temperature down to the minimum level? A. They figure they will.

Q. If this freezer room were larger they would have to add another coil?

A. They would have to add another coil, depending on the square feet in the room.

Mr. Lesher: I have nothing further.

Mr. Evans: I have nothing further.

The Court: It is noon. We will recess until 1:30.

(Noon recess.) [84]

Afternoon Session

June 10, 1958, 1:30 o'clock p.m.

VICTOR JAMES ANDREW

recalled to the stand, testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Evans): I believe when you were on the stand before, Mr. Andrew, you were requested to try to approximate the total expenses incurred at your operation here in the preparation of and the selling of meat products? A. That's right.

Q. Have you been able to do that?

A. Yes, I have.

Q. Will you tell us how you did it or what you have done?

(Testimony of Victor James Andrew.)

A. Our sales, our gross margins are shown on a per hundredweight basis. To be consistent, I took the expenses for that same particular month, and that was worked out on a per hundredweight basis, and that came to $1.99 a hundredweight. Figuring that times the weight, that approximately is two cents a pound, and I used that figure to save multiplication, it comes to about 578.64 for expenses.

Mr. Lesher: Will you repeat that, sir? [85]

A. $578.64. That is on 28,938 pounds.

Q. Is that number of pounds the total number of pounds of products that had to be disposed of as a result of the ammonia exposure?

A. That's right.

Q. At my request did you obtain some checks or cancelled checks of the company reflecting payments made by Swift & Company for the material furnished and the services purchased under the contract of May 31, 1955 with the Arizona York Company?

A. Yes.

The Court: Exhibit 1?

Mr. Evans: Yes, sir.

Q. (By Mr. Evans): I will hand you Plaintiff's Exhibit 12 marked for identification and ask you if you will identify those checks for us?

A. There are three checks here. The first two were partial payment and the last one is full settlement, I presume, of the contract. The first payment was made August 15 for $13,424.05, and it was made out to the order of Arizona York Refrigeration Company. The second payment——

(Testimony of Victor James Andrew.)

Q. I note the payee on the check is C. J. Olson, Relief Office Manager?

A. It is made out to C. J. Olson, Relief Office Manager. That was because I was on vacation and I was the only one [86] that had power of attorney, so I make the checks out to him and he in turn draws a check for our various suppliers and so forth, and endorses it and makes a special endorsement on the back to them.

Mr. Evans: We offer Plaintiff's Exhibit 12 in evidence.

Mr. Lesher: I have no objection.

Mr. Briney: No objection.

The Court: Received.

(Plaintiff's Exhibit 12 received in evidence.)

Cross Examination

Q. (By Mr. Briney): The first check of August 15, 1955 is payable as you have indicated; the second one of August 28th, '55, and, of course, it is payable to Arizona York Refrigeration Company?

A. Yes.

Q. The third check is dated February 2, 1956 and is payable to whom?

A. Southern Arizona York Refrigeration.

Q. It is signed by yourself? A. Right.

Q. At the time you wrote that check, you knew that Southern Arizona York was the party entitled to receive the money? A. Yes. [87]

Q. And it was Southern Arizona York who continued on the contract at about that time for serv-

(Testimony of Victor James Andrew.)

ices? A. Yes.

Q. And you knew that?

A. Yes. I wasn't aware of this reorganization or change in title. I drew the checks but Mr. Christianson and representatives of the construction department prepared the voucher and I merely drew the check.

Q. There is a voucher that would precede this check No. 10422, a voucher in the amount of $1,053.39 payable to Southern Arizona York?

A. Right.

Q. You prepared the check based on the voucher? A. Yes.

Q. And you would agree that Swift & Company knew then of the existence of Southern Arizona York and its proper relationship to the contract with you people? A. Right.

Mr. Briney: I have nothing further.

Mr. Lesher: Nothing, your Honor.

HARRY ROBERTSON

recalled to the stand, having been previously sworn, testified further as follows: [88]

Recross Examination

Q. (By Mr. Evans): Mr. Robertson, can you clear us up on who ordered the Bush units which were installed originally in the Swift plant here in Tucson, what company, which company?

A. Arizona York.

Q. Arizona York. That is the company that en-

(Testimony of Harry Robertson.)

tered into the original contract with Swift & Company? A. That is true.

Q. Was there ever any written agreement with Swift & Company that provided for a substitution of Southern Arizona York for Arizona York in the agreement of May 31, 1955?

A. Mr. Christianson advised that he didn't feel it would be necessary according to the terms of the transfer.

Q. Then I take it your answer is no, that there was never any written agreement from Swift accepting Southern Arizona York as a successor to Arizona York? A. No.

Q. Which company, or the employees of which company, actually installed the Bush units that we are concerned with in this case?

A. The original units?

Q. Yes, sir, the original units.

A. Employees of Arizona York.

Q. Arizona York. You did make an inspection of this [89] equipment after you were notified of this ammonia break of December, '55, did you not?

A. No, I did not.

Q. You did not? A. I did not.

Q. You weren't there at all? A. No.

Q. You apparently obtained information in some manner as to what happened to this machine, or to the unit? A. Yes.

Q. What was the source of that information?

A. From our service man.

Mr. Evans: That is all.

Mr. Briney: I think I will reserve my examination. It might be more orderly if I do so.

Mr. Evans: The Plaintiff rests, if your Honor please.

Mr. Briney: If the Court please, as I understand it, Count Three has been dismissed so there is no need to concern ourselves with that further, am I correct?

The Court: That is right.

Mr. Evans: That is correct.

Mr. Briney: I will move at this time for judgment in favor of the defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company and against the plaintiff Swift & Company upon the grounds and for the reasons [90] that the amended complaint, Counts One and Two thereof, fail to state a claim against either of the said defendants upon which relief can be granted. There has been a failure to prove as to either count, the material allegations of the complaint. As to each cause of action stated in Counts One and Two, these defendants are entitled to a dismissal and a judgment.

Very briefly, Count one as it is written is predicated upon express and implied warranties allegedly breached by Arizona York. As a result of the alleged breach of warranty, damages are asked in the sum indicated. The evidence, I think, while rather brief, was that the coils in question, those which had been put in place prior to September 4, 1955, were replaced, and new coils were supplied. To our view, this constitutes as a matter of Law a reci-

sion of the contract, and the claim for damages is gone. Count Two constitutes a claim for damages for breach of implied warranties only under clearly the Uniform Sales Act, the particular warranty dealing with seller knowing the purpose of the goods and defendant relying on them, and so forth. The same evidence would apply that the coils had been replaced, substituted new coils, that as a matter of Law constitutes recision. Section 69 of the Uniform Sales Act is quite clear. That is Title 44, Section 269, and I won't argue the language at this time, but it is the section providing for election of remedies and while the [91] record isn't as complete as it will be, there is evidence of substitution and recision, as a matter of law. Over and above that, on each of the two counts, I believe there is no showing of any breach of warranty express or implied either from the express language of the articles of agreement and specifications which are in evidence, or the provisions of the Uniform Sales Act. What the complaint seeks is consequential damage, damage done to products because of defective coils. There is no evidence that it was within the reasonable contemplation of the parties to this contract that consequential damages should be covered. It seems to me rather clear, as a matter of fact, that the only legitimate argument that could be made as to reasonable contemplation of the parties would be as to stuff in the room that, within the room that those coils were to keep cold, certainly not stuff outside served by a door which our people have nothing to do with. Those coils weren't

to keep anything cold, but that particular room. That is the position we take on that.

Nowhere in the contract, articles of agreement and specifications do we believe there exists an express or by implication from the nature of the transaction, any warranty of payment for consequential damages at all, absolutely none. The interpretation properly applied to the contract is to replace without charge for materials or [92] labor things that go on a fritz.

The Court: Where is that?

Mr. Briney: I have to dig a little bit. I hate to sit here and tell the Court what the contract says when I haven't heard counsel.

The Court: I am interested when you are speaking of express warranty.

Mr. Briney: I am anticipating what they are going to argue, I guess. The general conditions of the contract attached to the articles of agreement to my knowledge refer to a problem of guarantee or warranty only in Section—the only one that counsel apparently has given their concern to is subsection 21 of the general conditions, and it reads: "No certificate given," et cetera, "shall be construed as acceptance of defective work or improper materials," and so forth. Then it goes on, "no payment or certificate final or otherwise shall be construed as relieving the contractor from his obligations to make good any defective—on consequences thereof discovered in his work and after acceptance of the same, other than those due to accident, abuse," et cetera. I interpret that as no

warranty of consequential damages, certainly not outside the reasonable contemplation of the parties. There is no testimony as to the contemplation of the parties at all. They have failed to prove. You can't speculate. If this contract calls for [93] interpretation orally as to reasonable contemplation of the parties, the burden is on the plaintiff to prove it. It is not on the defendant to disprove it. There is no testimony as to the reasonable contemplation of the parties. The language alone I think does not infer an agreement to pay for damage of this nature, certainly not to the extent of the claim. Subsection 32 talks about indemnity provision for many claimed expenses against the owner by reason of person or property. I have always felt very clearly that doesn't have any application here. What that is talking about is during the job if York knocks a wall down with a truck, for instance, or somebody gets hurt by York men doing part of the job, then they would naturally indemnify. That is a standard provision. I don't think that has any application to this.

If my recollection is right, that is all that is in the articles or general conditions that could be relied on as setting up an express warranty. The only other matter I am aware of that would contain any express language that would place any obligation upon our people is contained in the specifications which I shouldn't have mentioned on the pre-trial, but whichever specifications apply, and I am a little dubious myself, because neither of these is the one referred to in the articles of agreement dated May

—the articles of agreement incorporate—strike that. The [94] general conditions of the contract refer to specifications dated March 10, 1955, page 1 through 10, inclusive. Neither of these Exhibits 9 and 10 conform to that designation. As a matter of fact, while one of them at least has ten pages, there certainly aren't ten numbered pages.

The Court: Is that No. 9?

Mr. Briney: Yes. It has ten pages. They aren't numbered 1 through 10. That is a little odd to say nothing else about it. In any event, both 9 and 10 have language to this effect: Guarantee that the design, materials and workmanship of the machinery, et cetera, should be first class in every respect suitable for the purposes intended, that all parts furnished by the contractor to operate and perform the functions to present durable service. I would certainly interpret what I just read: All parts furnished to operate and properly and be durable. That isn't any guaranteed past replacement. The next language is no payment over and apart should be construed as a guarantee. It doesn't add a thing to anything existing. The only language that I can see is an express warranty and I don't think it does a bit more than the Statute would in any event; in fact, the language sounds like the Statute, that the design, material and workmanship, machinery and all parts of the plant furnished shall be first class in every respect suitable for the purpose intended. We would contend that is not express warranty of [95] payment for consequential damages of this character. In any event, it

doesn't go any further than the Uniform Sales Act applies. The nature of the complaint is such that no matter what argument might be made how or what theory this case could be presented on, this is a case for breach of contract, breach of sale, breach of warranty on sale. Count One, you can read it, and that is exactly what it says. This is not a claim for breach of contract to do work and labor. All you have to do is look at Count One, and paragraph 3, warranted all equipment, material and workmanship. 4: about December 5th, express and implied warranty provided was breached by defendant when ammonia escaped from defective equipment installed by, as a result of breach of warranty. What they are talking about is a breach as to these coils. That is all they are talking about. Equally, more so is that true as to Count Two, which appears to be clearly a statutory claim based on the Uniform Sales Act, we putting in a system knowing the purpose for which it is to be put. The language is very clear, a claim for breach of warranty of sale. Both Counts are claim for breach of warranty of sale. That is not unusual as evidenced by two Federal cases and another I have a note of here. One holds that a refrigeration system installed is a sale under the Uniform Sales Act. The other one holds a conveyor belt, conveyor system, is a sale, and another holds an elevator [96] installation is a sale, all under the Uniform Sales Act. Somewhere in this map I have it. The Federal cases are 219 Fed. 2d 573. They hold that the installation of a refrigerator system in a slaughter

house was one for sale of goods rather than for labor and materials, and it was within the provisions of the Sales Act, implied warranty. In the same volume, 219 Fed. 2d 583, holding the installation of a conveyor system in a plant was for sale of goods rather than for labor and material, and fitted within the Sales Act.

A Colorado case, 81 Pac. 2d 764, Fifteenth Street Investment Company vs. People, and it holds to the same effect as to an elevator installation, $52,000 involved. Undoubtedly a lot of work was labor and they held and the language is useful I think, the fact that work and labor has to be done in connection with materials sold going along with the fact it doesn't change the essential character of the transaction and if the whole or any measurable part of the consideration for the performance of the contract is compensation for the material, it is a sale. That is a tax case. I grant you that, but it does fit the interpretation of the other two cases, and the way the case is pled, that is what we have here, as I interpret it.

For those reasons and to that extent without extending it any further, I think the record is devoid of the necessary [97] proof of damages.

I think the motion for judgment in favor of the two York Companies and against the plaintiff, a good ground is that the plaintiff has failed to prove the damages proximately resulting from any acts or omissions of this defendant. Any contractural violation, statutory or otherwise, there is a gap in the proof that is required. While the cases on both

sides, I think the majority of the cases say that loss of profit is generally not recoverable unless specifically it is within the contemplation of the parties and certainly the testimony here as to costs to Swift don't exist. And to the extent that the actual cost out of pocket loss to them is the measure of damages and the proof is insufficient.

The Court: Mr. Evans, if you will tell me what you rely on for express warranty.

Mr. Evans: The provision in the specifications, if the Court please, on page 2 of both sets of the specifications, and it is identical language. In addition to that, we don't agree that, with Mr. Briney, as to the limited effect of the provisions of Section 32 of the general conditions of the contract providing that the contractor will indemnify the owner for any injury suffered to the owner's property caused by the contractor. In addition to that, we certainly do rely on the Statutory provisions for implied warranty where nobody could possibly escape the conclusion where you are [98] given a set of plans and specifications providing for the equipping and installing of equipment to do a certain job, but what that knowledge is communicated to the person that did on the contract and eventually gets the contract, but what he is charged with the notice, the purpose for which the job or the work of the material or the goods is intended, and there we have the statutory warranty which comes in the Uniform Sales Act. We rely on both things, on all the points I have mentioned to the Court.

The Court: The motion for judgment is denied.

MAURICE D. GERHART

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Briney): State your name, please?

A. Maurice D. Gerhart.

Q. Your business or occupation?

A. I have a refrigeration service business.

Q. How long have you been in the refrigeration business? A. About thirty years.

Q. You live in Tucson now? A. Yes, sir.

Q. In your business have you had occasion to inspect various types of refrigeration equipment, refrigeration coils, with the view to determining any failures or defects in them? A. Yes.

Q. In December, 1955, did you have any occasion to inspect Busch coils on the premises of a certain company plant on East 17th Street?

A. Yes, sir.

Q. Will you state as best you can remember what the circumstances were surrounding your inspection of those units? Do you remember when it was specifically you went out there?

A. No, I don't remember. It was about '55—'56, I don't remember exactly.

Q. If I told you there was a failure and leak in ammonia damage about December 4th or 5th, 1955, would that help you as to the dates you went out? A. That was about it.

Q. A few days after that would you say?

A. Yes. I was called on the phone by an insur-

(Testimony of Maurice D. Gerhart.)

ance adjuster to see if I could devise some plan that would pinpoint a leak in a coil, and I told him I thought we could do it, so we set the coil up.

Q. Tell what you did and who was there at the time. [100]

A. We set the coil up. I plugged one end. There were two openings in the coil, and the other opening was connected to an ammonia drum. When we allowed the ammonia to enter the coil, naturally it came out the leak. We then burned sulphur in the presence of the leak and in so doing that, sulphur and ammonia combined form a white fume which can readily be seen, and he took pictures of this, actions that took place, and I think it pinpointed the position of the leak in the coil.

Q. What was the position of the leak in the coil?

A. It was in the interior of the coil itself, that is, it wasn't in any external connection where a mechanic would have made a connection; it was in a part manufactured in the factory.

Q. Specifically which portion of the coil are you referring to?

A. It was where a feeding element had, was inserted into a tube in the coil.

Q. I call your attention to a series of photographs numbered Defendant's J in evidence. As to J in evidence, I will ask you if that shows the type coil you inspected in place on the ceiling?

A. Yes, that was the type of coil.

Q. Then calling your attention to Defendant's Exhibit K in evidence, I in evidence, and G in

(Testimony of Maurice D. Gerhart.)

evidence, I will ask you [101] if those pictures show the results of the tests with regard to the clouds of smoke, if I used the right word, when you burn sulphur in the presence of the activated coils?

A. Yes, sir.

Q. Can you by referring to any particular of those three photographs point out to the Court where the leak was? Do they sufficiently show you the specific point of the leak?

A. Well, I can't see here now there is any specific——

Q. Let me call your attention to Defendant's K in evidence, does that show the end of the unit, the coils of the heater element inserted in the inner coils? A. Yes, sir.

Q. Can you point out where the heater elements go in the tubes, just by an "x" at the various points with a pen? A. These are the heaters.

Q. Put "x's" by them. Are there a series of them? A. Yes.

Q. Put an "x" on each one of them. How about the ones up above?

A. Yes. Not all of these leaked.

Q. I understand that. From relation to those "x's" and the relation to these "x's" where was the leak?

A. Where the tube itself, where the heater element of the tube entered into the header right at the point where I have an "x". [102]

Q. By the header you mean the big wide piece of metal tube that runs vertically up and down?

(Testimony of Maurice D. Gerhart.)

A. Yes.

Q. Was the leak at one or more than one place where the elements entered the header?

A. At one place, as I remember.

Q. And the photographs showing the smoke, do they demonstrate the existing leak?

A. Yes, sir.

Q. I will show you a color photograph, Exhibit C in evidence, and ask you if that also shows the test conducted and the results, physical results of the test?

A. Yes, sir. That is the indication that there was a leak in the coil, came from the coil itself.

Q. Can you give me an opinion as to the cause of the particular leak, based on your experience?

A. No, sir, I don't think I could. I determined in my mind it was in the manufacture of the coil. It was inherent when the coil was manufactured. It wasn't after the coil had been manufactured. What caused it, I could not say.

Q. Did you have anything further to do with that particular equipment?

A. No, sir. We disconnected the equipment and I left the coil there. [103]

Mr. Briney: No further questions.

Mr. Lesher: I have nothing.

Mr. Evans: I have nothing.

The Court: Are you through with Mr. Gerhart?

Mr. Briney: Yes.

(Witness excused.)

LEE GIDEON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Briney): State your name, please.

A. Lee Gideon.

Q. Where do you live?

A. 4553 East Tyndall, Tucson.

Q. What is your present business or occupation?

A. Refrigeration mechanic.

Q. For whom do you work?

A. Walley Sevits York.

Q. How long have you been with Sevits?

A. Since the first of this year.

Q. Were you ever employed by Arizona York Refrigeration Company? [104] A. Yes.

Q. Will you state the periods when that employment commenced?

A. I don't remember. Just when I came into town I went to work for them and stayed with them all the way through, even during the change over to Southern Arizona York.

Q. About how long a period of years did you work before either Arizona York or Southern Arizona York?

A. I don't remember. I worked for York since 1950 and the dates when they changed hands, I don't know the dates.

Q. Were you in the employ of Arizona York Refrigeration Company from, say, the 1st of January, 1955, up until September 1, 1955?

(Testimony of Lee Gideon.)

A. I think so, yes.

Q. From September 1, '55 to the end of the year, were you employed by Southern Arizona York?

A. If those dates are correct, I was.

Q. If that is true, that was the status of your employment? A. Right.

Q. What, if anything, did you have to do with the installation of Arizona York or Southern Arizona York of a refrigeration system at Swift plant at East 17th Street?

A. None on the installation.

Q. What? [105]

A. None on the installation.

Q. What was your first contact with the job?

A. I started up to check out.

Q. About when was that?

A. The dates I can't tell you.

Q. In relation to December 4, 1955?

A. It was prior to that.

Q. About how long?

A. Three months, four months.

Q. Did you go out to those premises at that time? A. Yes.

Q. Did anybody from York go out with you?

A. Probably at various times.

Q. Would you tell me what you did there at that time?

A. Well, we started charging the equipment up with ammonia, started in the operation, checked out anything that could be the matter with it.

(Testimony of Lee Gideon.)

Q. What?

A. We started it up, checked it out at the temperatures and controls and so forth and put it into operation.

Q. I take it you weren't concerned with installation, you were a service man? A. Right.

Q. Whose responsibility with York was it to see that this job out there ran properly? [106]

A. Mine.

Q. Did you have any occasions when any leaks were reported to you or your company?

A. Yes.

Q. Can you tell me approximately when the first was reported?

A. I can't remember, but they were in advance to the bad one.

Q. By the "bad one", do you refer to the ammonia leak of December 4 and 5? A. Yes.

Q. Were you out there at that time, too?

A. Yes.

Q. How many initial calls were there about leaks or troubles prior to the serious difficulty?

A. There were three that were repaired. I might have had more calls than that due to the fact there were a few leaks not detected when the unit was cold. At times when it was frozen when we would get there, the leaks probably were very minor and as time went on they got bigger, calls were more numerous than the three times when they were repaired.

Q. In relation to December 4, 1955, can you tell

(Testimony of Lee Gideon.)

me about what dates those leaks occurred by months, say?

A. I think we probably had over a two months period of time, three that were repaired, and I don't remember how [107] many calls.

Q. Did any of those leaks occur prior to the 1st of September of that year?

A. I don't think so.

Q. Then you say you can recollect three repairs prior to——

A. That I was able to find on the job.

Q. Calling your attention to the first time you went out in connection with the leak, what did you discover and what was done?

A. I found a leak in one of them and we got a welder to come in and weld it.

Q. When you say "one of them", what are you referring to?

A. One of the electrode tubes.

Q. Were they in the freezer room?

A. Yes.

Q. How many coils were in the freezer room?

A. Two.

Q. And the manufacturer's name of the particular coils? A. Busch.

Q. Do you know in which of the two coils the first leak was discovered?

A. The south coil.

Q. By south, you mean at the south end of the freezer room? [108] A. Yes.

Q. Was the unit in place at that time?

(Testimony of Lee Gideon.)

A. Yes.

Q. Both units were? A. Yes.

Q. And the repair work was done with the units in place, or were they removed?

A. In place.

Q. Who was present when you made that first examination and discovery of the leak?

A. I don't know how many, but I know Frank Rosinski was.

Q. How did you determine the leak?

A. By burning sulphur.

Q. Did you do that yourself? A. Yes.

Q. Where was the leak?

A. It was in the electrode tube.

Q. Is that something your installation people had anything to do with? A. No.

Q. What did you do about repairing it?

A. Called in a welder and he welded it shut and pulled the electrode out.

Q. Who was the welder?

A. George Audish. [109]

Q. Was any charge made to Swift & Company as far as you know for that?

A. Not to my knowledge.

Q. Do you know who paid for the welding that was done? A. Southern Arizona York.

Q. Do you have any personal knowledge as to what they were compensated by somebody else for?

A. No.

Q. The second leak occurred roughly how long after the first one?

(Testimony of Lee Gideon.)

A. It wasn't too awfully long, when we got the second one.

Q. How did you get wind of that, did you get a telephone call?

A. I had a telephone call, yes, sir.

Q. Who sent you out?

A. Probably Mr. Robertson. I wouldn't know for sure.

Q. What did you discover when you got to the premises?

A. The same thing that I had before.

Q. In the same coil or another coil?

A. I think this time it was in the other coil.

Q. The north coil? A. I believe so.

Q. Could you pinpoint for us where the leak was?

A. The same kind of a leak exactly, electrode tube. [110]

Q. Is that something where the installation of your people had anything to do with it?

A. No.

Q. What was done about that leak?

A. The same procedure, pulled the electrode tube and welded it.

Q. Did anybody give you any instructions as to the method in which the repairs should be made?

A. Yes.

Q. Who? A. Red Butler.

Q. Who is he?

A. I am not just exactly sure, but he represents

(Testimony of Lee Gideon.)

Bush, whoever sells for Bush from the West Coast, Riverside, California. I talked to him by phone.

Q. That was in connection with the first or second leak? A. The first and the second.

Q. Was Mr. Butler present at any time during any of those repairs?

A. Not while the repairs were being made.

Q. Was he in town; did you have any discussions with him yourself as to the making of any of those repairs? A. Yes.

Q. Approximately when was that in relation to the second leak and repair of the second leak? [111]

A. I called him.

Q. What was the nature of the discussion?

A. He told me to pull the tube and repair it again and said he would come down.

Q. Did he come down? A. Yes.

Q. You did repair it the way he told you?

A. Yes.

Q. Do you know whether Swift was charged for any of that work?

A. I don't believe they were.

Q. Do you know who paid for the work?

A. Arizona York, I think.

Q. Do you have any personal knowledge that they were compensated by anybody else?

A. No.

Q. Was there a further occurrence or incident of a similar nature? A. Yes.

Q. In relation to the second leak, about when was that? A. Shortly thereafter.

(Testimony of Lee Gideon.)

Q. Who made the service call? A. I did.

Q. What did you find when you got there?

A. The same trouble. [112]

Q. In connection the coils north or south?

A. South coil.

Q. That is the one you originally worked on?

A. Right.

Q. Can you pinpoint the approximate place where the leak had occurred?

A. In the electrode tube.

Q. Were you present when Mr. Gerhart undertook to test the coils and see where the leak was?

A. No, I wasn't.

Q. Did you each time you went out there on the service calls make the test you indicated you did the first time, with sulphur? A. Yes.

Q. And with ammonia in the coils?

A. Yes.

Q. Can you point out on Defendant's Exhibit K the approximate location of say the third leak? Let us assume that is the north coil. Do you notice some "x's" Mr. Gerhart put on there, but disregarding those, can you tell us approximately where the leak was?

A. Right where he has the "x's".

Q. On one or more of those electrode insertions?

A. At one, a different one at each time.

Q. But only one each time? [113]

A. Only one each time.

Q. What repairs, if any, did you make the third time? A. The same repair.

(Testimony of Lee Gideon.)

Q. What did you do?

A. Pulled the electrode tube and welded the tube shut.

Q. What does an electrode do?

A. It defrosts the coil.

Q. It is a heating element?

A. It is a heating element.

Q. When the electrode is pulled, what affect has that on the operation of the coil?

A. Slower to defrost or less heat.

Q. When you sealed off the particular tube, did you seal it off at each end of the unit?

A. Yes.

Q. What is the effect of that with regard to the operation of the unit?

A. None so far as efficiency is concerned, I believe.

Q. Did you other than those three occasions, did you have any further contact with or connection with either of the coils in the freezer room at the Swift plant prior to December 4th or 5th, 1955?

A. I probably worked on them, but nothing serious.

Q. At any time during your presence at the plant for those three repairs, and any other service calls, did anybody [114] at Swift discuss with you the problem of whether you were working for Arizona York or Southern Arizona York?

A. No, sir.

Q. Did anybody ever refuse to let you proceed with the job because you were working for South-

(Testimony of Lee Gideon.)

ern Arizona York? A. No, sir.

Q. Who did you deal with at the Swift plant in each of the three cases?

A. Generally Frank Rosinski. He would be the one who would call me.

Q. Did you have any contact with a Mr. Craig?

A. Yes.

Q. When did you have contact with him?

A. Approximately every call we would have conversation.

Q. How about Mr. Christianson, did you have occasion to meet him during any of those service calls? A. Yes.

Q. What was your understanding of his relationship to the project or operation of the plant?

A. After the plant was put into operation, Christianson stayed around for awhile to iron out any difficulties he might see and so forth and get the temperatures at the proper temperatures and control and then he left and he came back a few times, but he just happened to be around. We didn't have any actual business, conversations, on those other calls. [115]

Q. The third time, the third leak you repaired, did Audish do the work then too? A. Yes.

Q. Do you know if Swift was charged for any of that work? A. I don't think so.

Q. Do you know who paid for the work?

A. Southern Arizona.

Q. Do you know whether anybody else repaid Southern Arizona for it? A. No.

(Testimony of Lee Gideon.)

Q. Tell me, what was the cause of these three leaks in your opinion?

A. I think the coil inside ruptured.

Q. Do you have an opinion as to the cause of the rupture? A. Just a theory.

Q. What is your theory?

A. I believe condensate froze within the tube on the freezing cycle expanding the tube.

Q. Resulting in what?

A. In a broken tube.

Q. Since that time have you had, done any servicing on any other Busch coils in place at that Swift plant? A. Yes.

Q. When was the last time you did any work on such coils at that location? [116]

Mr. Evans: I object to this as immaterial and irrelevant, servicing subsequent to the occasion of which we are involved.

Mr. Briney: What I have in mind is asking him about the difference in design or manufacture. I think it is material.

The Court: In Busch too?

Mr. Lesher: I have no objection.

Mr. Briney: Different coils were manufactured differently, as I understand it, and I want this witness to tell us what he can about that, establishing the defect in the original design.

The Court: He may answer.

A. Yes, last week.

Q. (By Mr. Briney): Are the units, the coils in the freezer room, now of the same design with

(Testimony of Lee Gideon.)

regard to the heating elements in the tubes as those you repaired prior to December 4, 1955?

A. The heating elements are, the design is different.

Q. In what respects?

A. The tubes are sealed.

Q. Are they Busch units you have worked on since the damage occurred in December, '55?

A. Yes.

Q. Did you have occasion to be on the Swift premises [117] in close relation to December 4 and 5, 1955? A. Yes.

Q. Will you state the date to your best recollection when you were there?

A. I know it was on a week-end on early Monday morning and a conversation since, it is on December 5th, the morning of December 5th.

Q. What were the circumstances under which you went out there?

A. Frank Rosinski called me early in the morning, I think 5:00 o'clock or so, and said he had a bad leak and I went over.

Q. What did you find when you got there?

A. I found the building full of ammonia.

Q. Did you get into the building to the freezer room at that time?

A. Not immediately, no.

Q. Approximately what time of what day did you go to the freezer room?

A. I am lacking in memory, but that ammonia was pretty strong and I went in and closed valves

(Testimony of Lee Gideon.)

and opened doors to the main leak room right then with a mask on and when I was able to go to the freezer room, I can't tell you.

Q. Did you go to the freezer door sometime thereafter? A. Yes. [118]

Q. Can you tell me whether the door to the freezer room was open or closed when you first saw it? A. It was open.

Q. Tell me what took place then? Were you on the premises on and off during the next several days? A. Yes.

Q. What was done?

A. They had a little time getting the meat out and getting permission to move the meat, and after it was moved out we hosed down all the walls in the freezer room and got the ammonia out so that they could get back in the building.

Q. What did you do with regard to the coils that were in the freezer room after you had the place clear of ammonia?

A. I closed the valves, pumped them out, closed the valves and let them sit.

Q. Were they removed from the ceiling and placed on the floor?

A. Not while I was there.

Q. Did you attempt to ascertain the cause of the leak December 4 or 5 of '55? A. Yes.

Q. Was that at the time after you got the ammonia out and closed out the units?

A. Yes.

Q. What did you observe to be the cause of the

(Testimony of Lee Gideon.)

leak? [119] A. Another electrode leak.

Q. Which coil?

A. I am pretty sure the south coil again.

Q. Was this leak at a place where repairs had been made on prior occasions? A. No.

Q. Was the leak of the same character?

A. Yes.

Q. Did you at that time or later make any tests of the equipment, run through any testing procedures to ascertain the cause of the leak?

A. After I found and knew where it was, I closed them off and quit until I decided what to do.

Q. What became of those two coils, if you know?

A. They were removed and replaced.

Q. When was that?

A. The dates I can't tell you.

Q. Did you have anything to do with taking those two coils out of the freezer room?

A. No.

Q. Do you have any personal knowledge what dates they were removed? A. Not exactly.

Q. Did you have anything to do with actually putting any different unit in? [120] A. No.

Q. Do you know whether additional units were put in? A. Yes.

Q. What units, what coils were put back in?

A. Bush coils.

Q. Approximately when?

A. I presume it was three weeks or so after the break. I can't remember.

(Testimony of Lee Gideon.)

Q. Did you have anything to do with the putting of those new different coils into operation?

A. Yes.

Q. State what you did.

A. After they were up, I got them started up and into operation.

Q. Did you undertake to inspect and test them prior to putting them in use? A. Yes.

Q. Did they test out all right? A. Yes.

Q. Let me take you back to the time when the original coils were installed. Sometime during the summer, late summer or early fall of '55, did you for Arizona York or Southern Arizona York test and inspect the Bush coils before they were installed?

A. Not before they were installed. [121]

Q. After they were installed and connected to the ceiling? A. Yes.

Q. Did you test them? A. Yes.

Q. What procedure did you use?

A. Ammonia.

Q. Were you satisfied with their condition before you put them in full use and operation?

A. Yes.

Q. At the time the new coils were put in some three weeks after the damage to the meat occurred, from the time you put them into operation, were the old coils still in the freezer room?

A. They were on the outside in the main building.

Q. In the cold storage room or outside?

(Testimony of Lee Gideon.)

A. Outside. That wasn't refrigerated space.

Q. Do you know what became of those units?

A. I suppose they went back to Busch.

Q. Did you ever see them back at Southern Arizona? A. They were there.

Q. Did you see them there? A. Yes.

Q. Approximately when? A. I don't know.

Q. Do you have any personal knowledge of what became of them after they were taken back there?

A. No.

Q. What relationship, if any, did you have to the refrigeration system in the Swift building subsequent to the installation in the two new coil units in the freezer room?

A. I did the service there every time there was any problem.

Q. With what frequency did you make service calls out there?

A. During the process of getting everything back into normal operation, several times to see that the temperatures were all right, and so forth.

Q. Whose employee were you at that time?

A. Southern Arizona York. It would be Southern Arizona by that time.

Q. Did you have dealings with any of the same men you have given us before for Swift?

A. Yes.

Q. Was any objection raised or any question raised who you represented or who you were working for? A. No.

Q. During the year 1956 after you had gotten

(Testimony of Lee Gideon.)

the new coils in operation in the freezer room, were you on the premises, the Swift premises, infrequently or frequently [123] during the rest of the year? A. I was called occasionally.

Q. Were you the person who normally made the service calls on all refrigeration units you installed?

A. Yes.

Mr. Evans: I think this is immaterial and irrelevant, if the Court please, way up into '56.

The Court: I don't see its materiality.

Mr. Evans: And I object to it.

Mr. Briney: No further questions.

Mr. Lesher: No questions.

The Court: You may be excused.

(Witness excused.)

HARRY ROBERTSON

recalled to the stand, testified further as follows:

Direct Examination

Q. (By Mr. Briney): You are the same Harry Robertson on the stand two or three times?

A. That's right.

Q. You were in the courtroom when Mr. Black testified this morning? A. Yes. [124]

Q. Do you remember he testified about a conversation with Harry Robertson at the Swift plant with regard to the coils and the defect in the leak?

A. Yes.

Q. Did you ever see him before you saw him in court this morning?

(Testimony of Harry Robertson.)

A. I don't recall ever having seen Mr. Black.

Q. Can you recall at any time after December 5, 1955 your having any conversation with Mr. Black or any gentleman at the Swift plant on East 17th Street in connection with the leaks or problem that resulted?

A. Not at the plant. I may have had some telephone conversations, but not at the plant.

Q. Who was the party on behalf of Arizona York Refrigeration who negotiated with the Swift representative concerning the installation of the refrigerator system at the 17th Street plant?

A. I did.

Q. With whom did you generally have your discussions?

A. All my discussions were with Mr. Christianson, construction superintendent.

Q. I think you have testified as to the original contract or articles of agreement that were entered into. You signed those for Arizona York, did you not? A. That's right. [125]

Q. Can you tell me, Mr. Robertson, whether there were any changes made in the contract or specifications subsequent to the time the job got started?

A. There were some changes in design, the equipment for the beef chill room. There was a question about the quantity of thin coil surface to go in there and we discussed that and made recommendation about changes. There was a discussion about the substitution of units for the freezer room

(Testimony of Harry Robertson.)

and also the power characteristics of the units for the freezer room. I believe that was probably all the major items of discussion.

Q. With whom were those discussions held?

A. With Mr. Christianson.

Q. What was your understanding of his relationship to the job in Swift & Company?

A. It was my understanding he had the authority to negotiate this contract on behalf of Swift & Company.

Q. Did anybody else there ever undertake to step in and take over such negotiations?

A. I had no contact with anybody else.

Q. Were any of these changes initiated by Mr. Christianson?

A. Yes. There was one change and one I failed to mention, that was the original specification stated that Swift would furnish one of the two compressors. It was learned after the time of the original bid that Swift could not furnish this compressor and the two new compressors would [126] be required in the contract.

Q. Who prepared the specifications on which the job was done? A. I don't know.

Q. Was it Arizona York or Swift & Company?

A. Swift & Company prepared them.

Q. I will hand you Plaintiff's Exhibits 9 and 10 in evidence, which have been discussed before, and ask you where they came from? Were they supplied by York or supplied by Swift?

A. Supplied by Swift.

(Testimony of Harry Robertson.)

Q. At the conclusion, on the latter couple of pages on each of those exhibits you will notice a list of equipment. Who prepared, to the best of your knowledge, the list of equipment, Swift or York?

A. This is their list of equipment.

Q. Who of the two parties, York or Swift, determined the fans or blowers that would be in the freezer room and the capacity of same?

A. The capacity of the units is the capacity as stated in the description of the units, and we offered as a suggestion that they susbtitute Busch of the same equivalent capacity for use in lieu of the Krack model set down in their specifications.

Q. You are talking about fans rather than coils?

A. I call them a fan coil unit, the blower unit.

Q. There has been some discussion about the fans or blowers that has some effect perhaps on opening the door to the freezer room. Are those the ones you are referring to?

A. That is correct.

Q. But the capacity of those, I take it, is supplied from the specifications supplied by Swift?

A. Yes.

Q. Did you folks have anything to do with installing, planning, or designing the door to the freezer room?

A. No. That is not part of our contract.

Q. Were any of these changes you have indicated were discussed with Mr. Christianson reduced to writing?

(Testimony of Harry Robertson.)

A. We offered a letter subsequent to our original quotation suggesting changes of equipment.

Q. What is marked as Exhibit 10 in evidence, I think, has a front sheet with a date June——-

A. June 1.

Q. 1955. Were those supplied to you by Swift & Company?

A. We have at least two sets of specifications.

Q. Was an additional set of specifications supplied after the job was started?

A. Yes. This presumably was following the beginning of construction.

Q. That is Exhibit 10? [128]

A. Yes, sir.

Q. Did you have any discussion at any time with Mr. Christianson regarding substitution of Busch—strike that. You have told us you discussed with Mr. Christianson substituting of Busch coils in the freezer room for Crack coils which have been mentioned in the specifications? A. That's right.

Q. Which type of coils were installed?

A. Busch coils were installed.

Q. Were those the coils you have heard some testimony about leaks having developed in them?

A. That is correct.

Q. Will you state approximately when you discussed with Mr. Christianson the substitution of the units?

A. As I recall, shortly after the signing of the contract, because delivery was an important item and we had a delivery confirmation on Busch which

(Testimony of Harry Robertson.)

could be furnished to meet Swift's delivery requirement.

Q. Did Mr. Christianson authorized the substitution?

A. He did. In fact, he was quite pleased to get that substitution.

Q. Can you give me the approximate date the installation was completed? I am not dealing with changes after the difficulty in December, but approximately when the installation was completed.

A. The middle of August or early September, 1955.

Q. Do you know a Tony Mitchell?

A. Yes, I do.

Q. Who is he?

A. He is a representative of Authorized Supply.

Q. And Authorized Supply Company, will you state what the nature of their business is, was at that time?

A. They are in the wholesale refrigeration supply business and furnish material and parts for the refrigeration units.

Q. Where was their office, Mr. Robertson?

A. Their office is located in Phoenix.

Q. Have you had prior business with Mr. Mitchell and his company? A. Yes.

Q. What line of products did Authorized Supply handle to your knowledge?

A. They have several product lines that they represent.

(Testimony of Harry Robertson.)

Q. Did they during the summer of 1955 sell Busch products? A. Yes, they did.

Q. During the time that your company was working on the installation of the refrigerator system at the Swift plant, did you see or talk to Mr. Mitchell? A. Yes, I talked with him. [130]

Q. Did Mr. Mitchell, was he aware of the nature of the job and the requirements of it?

A. Yes, he was.

Q. Did you have any occasion to order any materials from Authorized Supply Company in connection with the job? A. Yes, I did.

Q. What did you order?

A. We ordered two Busch coils and other ammonia accessories for use on that installation.

Q. With whom did you negotiate for the purchase? A. Mr. Mitchell.

Q. Were those oral negotiations originally, were they in Tucson or Phoenix by phone?

A. I believe they were by phone.

Q. About when was that? To refresh your recollection, I call your attention to Defendant's Exhibit N and M in evidence and ask you if that refreshes your recollection as to the dates you talked to Mr. Mitchell?

A. It was early June. This is dated June 4, 1955.

Q. Will you state the substance of the conversation?

A. Evidently I had asked by telephone for a quotation on the Busch units that would be of

(Testimony of Harry Robertson.)

capacity to handle this installation and Exhibit M is a letter from Authorized Supply Company quoting a price and delivery on the Busch units. [131]

Q. That is to your knowledge a true and correct photo copy of the original, is that right?

A. That's right.

Q. At the time the order was initially placed with Mr. Mitchell by phone, was he advised of the purpose for which the coils would be used?

A. Yes. I believe he knew what those were.

Q. Who chose the particular units, who determined the appropriate model number and size of the particular coils?

A. That is pretty well tied down as to size by the specifications. We have catalog data that give comparable sizes and capacities of units. I don't recall if it was his recommendation or mine from the catalog data, or maybe both of us, looking at the catalog to determine the capacity required for this particular job.

Q. Did you at that time have a catalog of Busch products which catalog had been supplied to you by Authorized Supply Company?

A. Yes, we had.

Q. And the particular units ordered and described were in that particular catalog you had at that time? A. Yes.

Q. I take it you discussed, from what you have said, the job with Mr. Mitchell and the requirements of the job? A. Yes. [132]

(Testimony of Harry Robertson.)

Q. As you indicated, Exhibit M constituted quotation of price, is that right?

A. That is correct.

Q. Did you then respond orally or in writing to the quotation?

A. We issued a purchase order subsequent to that time for two coils based on that quotation.

Q. Did you or did you not rely on Authorized Supply Company in purchasing and installing the Busch units referred to in your order?

A. Yes, we did.

Q. Are they the primary distributors of Busch products in Arizona?

A. They are the only source I had from Busch products at that time.

Q. In the past had you ordered Busch products from Authorized Supply Company?

A. Yes, we had.

Q. Was it your knowledge that their personnel were qualified with regard to the products they sold? A. Very highly qualified.

Q. How about Mr. Mitchell? What was your experience say as of June, '55 as to his qualifications in selling Busch products?

A. I think it is correct to state that he is well [133] qualified by virtue of his association with the refrigeration industry and had called on our firm and rendered excellent service insofar as his company was concerned, and we felt that we would be well served by doing business with him on this basis.

Q. Did Arizona York and you rely on Mr.

(Testimony of Harry Robertson.)

Mitchell and his company's representatives as to the quality of the particular coil? A. Yes.

Q. And the order went out under purchase order No. 1785, Exhibit M, is that correct?

A. That is correct.

Q. Were there any subsequent changes or modifications in the order?

A. The current characteristics of the fan, it specified, I believe three phase which was going to delay delivery and we were able to get Swift to accept the single phase motor characteristics, and I so advised Authorized Supply on June 14 not to delay the order but to furnish available motor 220 volt single phase.

Q. Defendant's Exhibit B in evidence—strike that. Defendant's Exhibit O in evidence is a photocopy of what document?

A. Letter from Authorized Supply to Arizona York stating that delivery would be held up if we had to furnish motors as [134] originally specified.

Q. Who did you deal with in the Swift organization in connection with that suggested change?

A. Mr. Christianson.

Q. Did he approve the change?

A. Yes, he did.

Q. Then I will hand you Defendant's Exhibit P in evidence and ask you whether that is a true and correct photocopy of the letter you wrote to Authorized Supply stating that the change was satisfactory to Swift & Company?

A. It is, yes.

(Testimony of Harry Robertson.)

Q. Were there any further written instruments as to the particular sale of the coils between your company and Authorized Supply that you can recall? A. Not that I remember.

Q. When did the coils come through to you from Authorized Supply or from Busch?

A. As I recall, they were delivered sometime in July.

Q. Were they installed? A. Yes, they were.

Q. Can you tell me who installed them?

A. Our installation crew. Do you want the names?

Q. If you know them.

A. Mr. Sayers and Mr. Wong. The others I wouldn't remember. [135]

Q. Of the total contract between your company and Swift & Company, the contract price, do you remember what it was? A. $18,257.

Q. Referring you to Exhibit 1 in evidence, Plaintiff's Exhibit 1, the contract price there is $18,257, right? A. That's right.

Q. What percentage of that contract price consisted of equipment or material supplied by your company? A. I would say 70 to 75%.

Q. And the balance of the total contract price represented—— A. Labor.

Q. Prior to September 1, 1955 were you an officer of Arizona York Refrigeration Company?

A. No, I wasn't.

Q. Your precise job was what?

A. Manager of the Tucson division.

(Testimony of Harry Robertson.)

Q. Do I correctly understand that company operated both in Phoenix and Tucson?

A. That is correct.

Q. Mr. Ray, did you know him prior to September 1, '55? A. Yes.

Q. What was his capacity with the company?

A. He was president of Arizona York Refrigeration.

Q. Calling your attention to September 1, 1955, I ask you whether as of that date there was any change in the [136] organization?

A. Yes. Mr. Ray and his partner in the Arizona York Corporation——

Q. Whose name was what?

A. Maggs.—divided the company, Mr. Ray took me as a partner in the new corporation, Southern Arizona York Refrigeration Company, and Mr. Maggs took in two employees in Phoenix to the parent corporation.

Q. From and after September 1, 1955 were you an officer of the Southern Arizona York Refrigeration Company? A. Yes, I am an officer.

Q. What is your capacity?

A. Vice president.

Q. Who is the president? A. Mr. Ray.

Q. When was Southern Arizona York incorporated?

A. Early in September, 1955, the exact date I can't remember.

Q. State whether or not after September 1, 1955

(Testimony of Harry Robertson.)

any notification was given to Swift & Company as to the change in the corporation?

A. We issued a letter, joint letter stating the change, and forwarded that to all suppliers and contractors, and also, I know I discussed personally that situation with Swift representative, Mr. Christianson. [137]

Q. Approximately when was that discussion?

A. Oh, the middle of December, September, excuse me.

Mr. Evans: The middle of September?

A. Yes.

Q. (By Mr. Briney): I think maybe you have already referred to that discussion, but was it your understanding as a result of that discussion and any notification given that he was aware that Southern Arizona York was thereafter the party concerned in the contract with Swift?

A. Yes. He was aware of it.

Q. At any time did Mr. Christianson or anybody from Swift object to the proceeding under the contract, including the service warranty for the year after the contract was completed by Southern Arizona? A. No, they didn't.

Q. Was there service performed by Southern Arizona York as a follow-up of the initial contract?

A. That is true.

Q. For what period of time did such service continue?

A. We are still performing service for Swift & Company.

(Testimony of Harry Robertson.)

Q. Services were performed by which company?

A. Southern Arizona York Refrigeration Company.

Q. To your best recollection, was one of these letters, joint letters, sent to Swift & Company in Tucson? A. I don't recall for sure. [138]

Q. I think you indicated you sent to all parties——

A. Contracts still in progress, yes.

Q. Was the Swift contract still in progress on September 1, '55? A. It was.

Q. Was there any warranty or guarantee which your company, either Arizona York or Southern Arizona York, received from Authorized Supply Company in connection with the sale of the two Busch units we have discussed? A. No.

Q. Is there any customary standard practice in the business whereby any guarantee or any warranty of any kind accompanies said goods?

A. In some cases where you purchase delivery from a factory, they have a certain form. It isn't customary where you purchase from a jobber or sales representative.

Q. These were purchased, they were shipped directly from Busch, weren't they, the units?

A. I couldn't be sure.

Q. What if anything do you know about any leaks which occurred in the Busch coils which were installed in the Swift plant prior to December 4, 1955?

A. I know we had other leaks in the coils that

(Testimony of Harry Robertson.)

occurred. The first one, as I recall, was about a month after the plant was put into operation. [139]

Q. Let me backtrack. Did you send notice of the change in the character of the corporation to Authorized Supply Company?

A. Yes, we did.

Q. Was any objection ever made by them at any time whatever to your knowledge of any business dealings between Southern Arizona and Authorized Supply Company? A. No.

Q. During the time that the coils were billed for, the original coils were billed?

A. No, I don't.

Q. Can you tell me which corporation, Arizona York or Soúthern Arizona were billed for them?

A. The only record I have of the accounts payable ledger, which shows probably both companies paid, because they were on an open account basis with Authorized Supply.

Q. In connection with the first leak that occurred in Busch coils in the Swift plant, did you have any discussions or consultations with Red Butler for Busch Company?

A. As I recall, he called Authorized Supply at the time of the first failure, and the suggestion for repair was transmitted from them to us to have that coil repaired.

Q. The repairs were done by whom?

A. By Audish Welding.

Q. Who paid Audish? [140]

A. We did, Southern Arizona York.

(Testimony of Harry Robertson.)

Q. Were you repaid by another party for that expense?

A. We invoiced Authorized Supply, I believe.

Q. Did Authorized Supply pay for that work?

A. As I recall, Busch paid for it.

Q. In any event, would I be correct to say you were repaid for that expense? A. Yes.

Q. Did you have any further contact with Mr. Butler in connection with any of the leaks?

A. The subsequent leaks, we contacted him directly.

Q. Did he come to Tucson?

A. He did, yes.

Q. Can you recall about when that was?

A. I think it was in October. It was at the time of the second failure. He came to Tucson to check himself.

Q. Were you in company with him at that time in connection with that difficulty?

A. No. He went to the job with Mr. Gideon.

Q. Did you have any conversations with him about it, Mr. Butler? A. Yes.

Q. Where was that?

A. In our office.

Q. Who was present? [141]

A. I don't recall.

Q. What was the conversation?

Mr. Evans: We object to it as hearsay.

The Court: This is with Mr. Butler?

Mr. Briney: Yes, sir.

The Court: Objection sustained.

(Testimony of Harry Robertson.)

Q. (By Mr. Briney): Who paid for the repairs done at the time the second leak was fixed?

A. I believe Busch did on that also.

Q. I am going to hand you Defendant's Exhibit L in evidence. Will you state what that is?

A. That is the accounts receivable ledger.

Q. What does it show?

A. It shows Busch Manufacturing Company paying $23 to cover an invoice for that amount to Authorized Supply Company.

Q. What is the date of the payment?

A. It looks like 9/16.

Q. And the year? A. 1955.

Q. And the amount of the payment?

A. $23.

Q. Do you know what that $23 represents?

A. I believe that was Audish's bill for repair to that coil. [142]

Q. After Mr. Butler was over—I think you indicated the time of the second leak, was there another leak prior to December 4th and 5th?

A. Yes, there was.

Q. Who paid the bill for the repairs?

A. I am not sure.

Mr. Briney: There is an exhibit attached to Mr. Butler's deposition that appears to be unmarked, which I am going to remove.

Q. (By Mr. Briney): You have heard the testimony that on December 4th and 5th there was a leak in the Swift plant that caused damage to products? A. Yes.

(Testimony of Harry Robertson.)

Q. Were you on the premises after that occurred? A. Not immediately.

Q. When did you get out there, do you remember? A. No, I didn't.

Q. Within a period of days, would you say?

A. Two or three days.

Q. Did you have any discussions with anybody at the Swift plant with regard to the cause of the trouble? A. No, I didn't.

Q. Did you then on any subsequent time have any discussions with anybody at the Swift plant with regard to removing the two coils which were in place at the time the trouble occurred [143] in the freezer room? A. Repeat that.

Q. Did you have any conversation with anybody at Swift concerning the removal of the two coils in the freezer room at the time the loss and damage occurred?

A. As I recall, most of the conversations regarding the removal of the coil or replacement of the coil, Mr. Ray had with Swift & Company.

Q. Do you know whether or not the two coils, Bush coils, in place at the time of the trouble were removed thereafter? A. They were removed.

Q. Approximately when?

A. Late in December.

Q. What became of them?

A. They were returned to Bush.

Q. By whom?

A. I believe we shipped them.

Q. Southern Arizona shipped them direct?

(Testimony of Harry Robertson.)

A. Yes.

Q. What then was done with regard to furnishing additional necessary equipment at the Swift plant?

A. We replaced those coils wtih an improved design of coil furnished to us by Bush.

Q. And were new coils supplied and put in place?

A. Yes. Our man put them in place. [144]

Q. Approximately when?

A. Late in December.

Q. Those new coils were supplied to you by whom? A. By Bush.

Q. Did you have any discussions concerning that substitution with anybody at Authorized Supply?

A. No, I believe not.

Q. Who handled that, if anybody?

A. Mr. Ray handled that.

Q. Did you have anything to do with any correspondence concerning that?

A. No, I don't think so.

Q. I will hand you Defendant's Exhibit G for identification and ask you if you will state what that is? A. That is a bank deposit slip.

Q. For what company?

A. Southern Arizona York Refrigeration Company.

Q. What is the date of the deposit?

A. December 16, 1955.

Q. The first item on the deposit is what?

A. Bush Manufacturing Company, $23.

(Testimony of Harry Robertson.)

Q. What does that mean to you, sir?

A. That, as I recall, was more repair, the treatment made by Audish.

Q. Is that the same leak you referred to in connection [145] with repayment?

A. Yes, I think so.

Mr. Briney: I offer it in evidence.

Mr. Evans: I have no objection.

Mr. Lesher: I have no objection.

The Court: It may be received.

(Defendant's Exhibit G received in evidence.)

Q. (By Mr. Briney): Did Swift & Company use the new units, Mr. Robertson? A. Yes.

Q. Was it with their agreement the old coils, the coils in place on December 4th and 5th, '55 were removed, was it not? A. Yes.

Q. Do you know whether there was a balance due and owing on the Swift contract as of September 1, 1955? A. There was, yes.

The Court: On September 1st?

Mr. Briney: September 1, 1955.

Q. (By Mr. Briney): I hand you Exhibit, checks, Plaintiff's Exhibit 12 in evidence and direct your attention to one check in the amount of $7100, approximately, to Arizona York Refrigeration dated October 28, 1955. That was in connection with the installation, was it, sir? A. Yes. [146]

Q. And the check was deposited in whose account, sir?

(Testimony of Harry Robertson.)

A. To the account of Southern Arizona York Refrigeration Company.

Q. And the third check dated February 2, 1956 in the sum of $1,053 payable to Southern Arizona York, was that check on the contract for the installation of the entire system? A. Yes, it was.

Q. Were there any further payments so far as you know from Swift to Southern Arizona York in connection with the job?

A. There was some small items for extra work, minor items, and some work in connection with the truck, should be over and beyond the contract.

Q. The payments for those additions was made by whom?

A. Made by Swift to Southern Arizona York.

Q. Those are supplementary matters and not referred to in the original contract?

A. That is correct.

Q. That work was done approximately when?

A. August, September.

Q. 1955? A. 1955, yes.

Q. Was any of that work done after September 1, '55? A. Some was, yes.

Q. Do I take it payment was made for all that extra work [147] after September 1, 1955?

A. It was, yes.

The Court: We will take the afternoon recess at this time.

(Afternoon recess.)

(After recess.)

HARRY ROBERTSON

a witness herein, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Lesher): Mr. Robertson, let me see if I understand the sequence of events correctly. Sometime after the 4th of December or 5th of December, you and someone representing Swift & Company got together and agreed that the two cracked coils would be—or the broken coils, would be replaced without cost to Swift, is that right?

A. It was not me.

Q. You did not have anything to do with that?

A. No.

Q. Were the two coils that evidenced the cracks replaced? [148] A. Yes, they were.

Q. And at the time they were replaced, Swift was given full credit for the purchase price on the old coils they turned back, isn't that correct?

A. You say full credit? There was no charges or credits made. Just installed the new ones and removed the old ones.

Q. You just took back the old coils that proved to be defective and installed new ones?

A. Correct.

Q. Swift didn't pay you for that?

A. No.

Q. As far as you know, are the coils presently in the Swift plant the same ones you installed in late December, '55? A. No, they are not.

Q. How long did those coils stay there?

(Testimony of Harry Robertson.)

A. I believe the second set of coils were installed in either May or June of '56.

Q. The coils that were cracked you took out in December, '55, you took back physically to your own establishment, did you not? A. Yes.

Q. And you arranged through Authorized Supply to have those coils replaced by Bush and Company, is that right? A. That's right. [149]

Q. And you shipped those broken coils, or defective coils, directly from your place back to Connecticut to Bush? A. Yes.

Q. And you received in return two new coils from Bush in West Hartford, Connecticut, did you not? A. That is correct.

Q. Those two replacement coils were supplied to you through Authorized Supply free of charge, were they not? A. That is correct.

Q. It is quite common in your business, isn't it, sir, for you to order a unit through a jobber or wholesaler and then have the unit delivered to you directly from the manufacturer, rather than coming through the jobber?

A. Yes. It is quite common.

Q. As a matter of fact, that is how the original coils that proved to be defective or alleged to be defective, that is how those coils got to you in the first place, directly from Bush in West Hartford, Connecticut?

A. I believe so, I am not sure.

Mr. Lesher: I have nothing further.

Mr. Evans: We have nothing.

(Testimony of Harry Robertson.)

Redirect Examination [150]

Q. (By Mr. Briney): The Bush coils you originally ordered through Authorized Supply Company, you indicated you had occasion to refer to the catalog. Were they ordered by description?

A. By model number, yes.

Mr. Briney: I have nothing further.

Mr. Lesher: Nothing.

Mr. Evans: Nothing.

P. Z. RAY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Briney): State your name, please.

A. P. Z. Ray.

Q. And your address?

A. 7032 Via Pisa, Tucson.

Q. What is your business or occupation?

A. I am president of Southern Arizona York Refrigeration Company.

Q. Is that a corporation?

A. That's right.

Q. How long has it been in existence as such?

A. Since the 1st of September, 1955. [151]

Q. And what is the state in which the company was organized? A. The State of Arizona.

Q. The other officers in the corporation, Mr. Ray, are what persons?

A. Mr. Robertson and my wife.

(Testimony of P. Z. Ray.)

Q. Prior to September 1, 1955, were you associated with a corporation of a different name, Mr. Ray? A. Yes, sir.

Q. What was the name of the corporation?

A. Arizona York Refrigeration Company.

Q. And for how long were you associated with Arizona York? A. I organized it in 1950.

Q. Who were the other officers of Arizona York immediately prior to September 1, 1955?

A. There were only two in the company and they were Mr. Al Maggs and myself.

Q. Who was the manager of Arizona York Refrigeration Company in Tucson prior to September 1, 1955? A. Mr. Robertson.

Q. He now is an officer of Southern Arizona York, is that correct? A. That is correct.

Q. You have been in court all day, have you not? [152] A. That's right.

Q. And heard the testimony from the various people concerning the contract, articles of agreement, entered into between Swift & Company and Arizona York Refrigeration Company, have you not? A. That's right.

Q. And were you familiar with the contract and nature of it and jobs to be performed for Swift?

A. Yes, I am familiar with it.

Q. When did you first move into Tucson personally; when did you move here?

A. I personally moved here September 15th. I didn't move my family here until the next year, September 15, '55.

(Testimony of P. Z. Ray.)

Q. Were you in Tucson on occasions on company business prior to September 1, '55?

A. Yes, every week.

Q. Was the Swift & Company job on East 17th Street completed on September 1, 1955?

A. There was some work to be performed and was virtually complete by that time.

Q. Who performed the work necessary to complete the contract?

A. Southern Arizona York.

Q. Was there a contract balance due to Arizona York or Southern Arizona York under the contract from Swift & Company [153] as of September 1, '55?

A. Part of the assets I took over, a balance something like $7100.

Q. Did the contract with Swift have a service warranty attached to it?

A. Well, it had a standard warranty, I believe.

Q. Who performed the services under that warranty after September 1, '55?

A. Southern Arizona York.

Q. At any time did Swift & Company object or protest as to the method of performing the service warranty? A. No.

Q. At any time did Swift & Company protest as to the replacement of the coils, for example, after September 1, '55 through Southern Arizona York Refrigeration Company? A. No.

Q. You have heard the testimony that certain payments were made by Swift subsequent to Sep-

(Testimony of P. Z. Ray.)

tember 1, '55 and one check dated February 2, '56 was payable to Southern Arizona York, which was a portion of the contract balance due and owing, is that right? A. That's right.

Q. Do you agree with Mr. Robertson that some extra work was done subsequent to September 1, '55 and payment was made by Swift to Southern Arizona? [154]

A. Some made after September 1, 1955.

Q. I will hand you Defendant's Exhibit A in evidence and ask you if you will state what it is?

A. This is an agreement of sale of my share of stock in the Arizona York Refrigeration Company, taking in lieu of them the assets of the Tucson Division which was to be transferred and was transferred into the new corporation, the Southern Arizona York Refrigeration Company.

Q. Pursuant to the agreement?

A. Pursuant to the agreement.

Q. I will call your attention to Schedule A attached to the agreement and ask if you could state the—as to that schedule which constitutes accounts receivable—the amount of the accounts receivable from Swift & Company as of the date of the agreement? A. $7,125.95.

Q. That accounts receivable was in connection with what work or business?

A. That was part of this contract.

Q. The contract originally between Arizona York and Swift?

(Testimony of P. Z. Ray.)

A. Between Arizona York and Swift and Company.

That is Plaintiff's Exhibit 1 in evidence, is that correct? A. That is correct. [155]

Q. Did Southern Arizona York assume, by virtue of the agreement, to service the Swift job as required by the articles of agreement originally entered into?

A. That is right. They agreed to service all contracts in progress or in operation.

Q. Exhibit B in evidence, state what that is.

A. Minutes of an organization meeting of the board of directors Southern Arizona York Refrigeration Company in which organization was made.

Q. I call your attention to Defendant's Exhibit T in evidence and ask if you can state what that is?

A. Special meeting board of directors. I haven't familiarized myself with these for some time, but I believe this is the agreement.

Q. Looking at the exhibit, does that certification evidence this is a true and correct copy of the minutes of a special meeting of the board of directors of Arizona York Refrigeration Company on August 31, 1955?

A. That is correct and I believe in which we agreed to divide the corporation up.

Mr. Briney: We offer it in evidence.

Q. (By Mr. Briney): I will call your attention to Defendant's Exhibit U for identification and ask you if you will state what that is?

A. That is a copy of the minutes of the meeting

(Testimony of P. Z. Ray.)

of the [156] Arizona York Refrigeration Company being certified by the Assistant Secretary J. A. Riggins.

Q. Do each of the Exhibits T and U deal with the termination of the Arizona York business in Tucson and the carrying on of the operation under the name of Southern Arizona York?

A. That's right.

Mr. Lesher: We have no objection to the two.

The Court: What is the date of "U"?

Mr. Evans: September 1, '55.

Mr. Lesher: We have no objection to T.

Mr. Evans: I have no objection.

The Court: What are you getting at in the long run, Mr. Briney, a novation?

Mr. Briney: I am trying to put the facts in evidence as to the relationship between the two companies of contract so that all facts available to us are here.

The Court: You don't try a lawsuit putting everything you can think of in evidence. I want your point.

Mr. Briney: The point is as we understand it, the Southern Arizona York Company is in the precise same status as Swift & Company in this lawsuit and on that contract as the original contracting parties, Arizona York Refrigeration Company.

The Court: What is your position as to the original [157] contract? What is their position?

Mr. Briney: By virtue of the original agreement in evidence, the Arizona York Refrigeration Com-

(Testimony of P. Z. Ray.)

pany gave up all of its rights under the contract and all of those rights were transferred to Southern Arizona York. By the same documents, Southern Arizona York has succeeded to all rights and interests and causes of action against Authorized Supply Company that originally might have existed in favor of Arizona York.

The Court: T is received.

(Defendant's Exhibit T received in evidence.)

Mr. Lesher: We have no objection to U.

Mr. Evans: No objection.

The Court: U will be received.

(Defendant's Exhibit U received in evidence.)

Q. (By Mr. Briney): Mr. Ray, did Southern Arizona York Refrigeration Company receive an assignment, original assignment, from Arizona York Refrigeration Company dated January 6th, 1958 assigning to Southern Arizona York any and all rights and causes of action which it had against Authorized Supply Company? A. Yes, sir.

Q. And looking at Defendant's Exhibit V for identification, I will ask you if that is the assignment? A. Yes, this is the assignment. [158]

Mr. Briney: I offer it in evidence.

Mr. Evans: No objection to V, your Honor.

Mr. Lesher: No objection, your Honor.

The Court: It may be received.

(Defendant's Exhibit V received in evidence.)

(Testimony of P. Z. Ray.)

Q. (By Mr. Briney): Mr. Ray, to your knowledge, was there ever any objection or protest made by Authorized Supply Company as to the change of Arizona York to Southern Arizona York in connection with adjustments and return of the original Bush units placed on the Swift job? A. No.

Q. Did Southern Arizona York and you as its president have occasion at any time after September 1, '55 to receive any correspondence from Swift & Company directed to Southern Arizona Refrigeration Company?

A. Yes, we had several letters.

Q. I will hand you a letter which is Exhibit R in evidence dated January 30, 1956 and ask you if you received that letter from Swift & Company so addressed as of that date? A. Yes.

Q. Did you have any correspondence, Mr. Ray, from Authorized Supply Company directed to Southern Arizona York Refrigeration Company after December 4 and 5, 1956? A. Yes.

Q. In connection with the particular coils that went bad [159] or their substitutions?

A. Yes. I had several letters from them.

Q. I hand you Defendant's Exhibits W, X and Y for identification and ask you if they are not letters from Swift & Company, its various departments, dated respectively December 23, '55, May 4, '56, May 11, '56, directed to Southern Arizona York Refrigeration Company in connection with the problem of the defective coils?

(Testimony of P. Z. Ray.)

A. That is correct. These are all letters directed direct to us.

Mr. Briney: I offer them in evidence.

Q. (By Mr. Briney): I will show you Defendant's Exhibit Q in evidence, and ask you if that is another letter from Authorized Supply directed to Southern Arizona York concerning the problem that arose having this trouble in December, 1955?

A. That is correct.

Q. Did you personally inspect the Bush coils after December 4 or 5, 1955 that were in the freezer room in the Swift plant?

A. The first coils that went bad you are speaking of?

Q. Yes, sir.

A. Not in the plant I never personally inspected, not the ones in the plant.

Q. What became of those coils, to your knowledge?

A. They were returned to our shop and afterwards I [160] received a letter from Mr. Mitchell with return material tags to ship them back to Bush and Company in Hartford, Connecticut.

Q. Was any charge made to Swift for those?

A. No.

Q. For replacement of those units?

A. No.

Q. Were they replaced?

A. They were.

Q. Approximately when did replacement occur?

A. The 27th and 28th day of December, '55.

(Testimony of P. Z. Ray.)

Q. Were any coils shipped to you from Bush direct? A. Yes, they were.

Q. Did you examine them at all when you got them? A. Yes.

Q. Did you notice whether or not there had been any change in design or manufacture with regard to the heater elements in the coil?

A. I had a letter from the president of the Bush Company stating it was a change in design they had made, and I did inspect them, and that was the second set of coils.

Q. And the men who did the replacement were employees of which company?

A. Southern Arizona York Refrigeration Company.

Q. There has been some reference here to a second [161] replacement of coils which occurred in 1956. Can you tell us the details and circumstances of that?

Mr. Lesher: I object as immaterial.

The Court: Objection sustained.

Q. (By Mr. Briney): With regard to payment for goods to complete payment for the installation under the articles of agreement, do you have any records which will show which constitutes requests for payment dated after September 1, 1955?

A. Yes.

Q. Can you produce those?

The Court: We have three exhibits marked for identification that are floating around.

Mr. Lesher: I have no objection to Exhibits X

(Testimony of P. Z. Ray.)

and Y. With regard to Exhibit W for identification, I object to everything except the covering letter to which I do not object.

Mr. Briney: I will withdraw the rest of the exhibit.

Mr. Lesher: Then I have no objection to the rest of the exhibit with the rest of the material withdrawn.

Mr. Evans: We have no objection. Should I take it off?

Mr. Briney: Okay.

The Court: Do you have any objection to it, Mr. Evans? [162]

Mr. Evans: No objection.

The Court: W, X and Y received.

(Defendant's Exhibits W, X and Y received in evidence.)

Q. (By Mr. Briney): You made reference to a letter from Bush Manufacturing Company regarding a change in design, did you not?

A. That's right.

Q. Is Exhibit Z marked for identification a true photostat of such letter? A. That's right.

Mr. Briney: I will offer it in evidence.

Mr. Evans: No objection to Z.

Mr. Lesher: No objection.

The Court: It will be received.

(Defendant's Exhibit Z received in evidence.)

Q. (By Mr. Briney): Exhibit AA for identifi-

(Testimony of P. Z. Ray.)

cation, which appears to be filled out, this final waiver of lien, will you state what that is?

A. This is a final waiver of lien on this contract which we gave waiver of any liens against the contract.

Q. And the date of it?

A. January 31, 1956.

Q. Signed by you?

A. Signed by myself as president of the Southern Arizona York Refrigeration Company. [163]

Q. Was the original of this document recorded? What became of the original?

A. We sent this to Swift & Company as a lien waiver and they asked for a lien waiver on each portion of the job as we went along and this was the final lien waiver.

Mr. Briney: We will offer it in evidence.

Q. (By Mr. Briney): There has been some discussion about the substitution of Bush coils that were in place December 4th, 1955 for Krack coils originally specified. Will you state briefly what your knowledge of that substitution was?

A. Yes. I originally estimated the job and used the estimate for Krack coils in there. We didn't get the contract until May 31. They had August 1st as completion date, which is only 60 days, and I called Specific Metals, which was the distributor or jobber for Krack coils and they told me they could not deliver these coils under 90 days, which was 30 days past our delivery date, and so consequently we related this information to Mr. Christianson and told

(Testimony of P. Z. Ray.)

him we were confident we could get an equal coil, and that was when Mr. Mitchell was contacted.

Mr. Lesher: We have no objection to Exhibit AA.

The Court: It will be received.

(Defendant's Exhibit AA received in evidence.)

Q. (By Mr. Briney): The two exhibits, Defendant's AC and AB, will you state what they are? [164]

The Court: Which are those?

Mr. Briney: AC and AB.

A. These are progress payments for various amounts of the work, stating the amount of the contract and the amount of money to be paid, the amount of money that has been paid and the balance due. We were required by Swift & Company to fill each one of these out before we got the payment.

Q. (By Mr. Briney): I notice neither of these copies is dated.

A. Frankly, we didn't date them because it was our copy and only the copies that went to Swift & Company were dated, apparently.

Q. Can you tell me the date or the approximate date of either of these requests for payment?

A. No, I can't tell you exactly, but I am quite sure it was after the 1st of September, otherwise it wouldn't have been under Southern Arizona York Refrigeration Company.

Q. Does that apply to both Exhibits AB and AC

(Testimony of P. Z. Ray.)

you now hold? A. Yes.

Mr. Briney: We offer them both.

Q. (By Mr. Briney): Did you have any conversations with Mr. Craig for Swift & Company in connection with the problem that developed after the leaks of December 4 and 5, 1955?

A. Yes, I did. [165]

Q. Will you state where those conversations were held?

A. I went out to the plant, the Swift plant, and I found out the extent of the damage and I talked to Mr. Craig during that day and a couple of days after that I had several conversations with him over the telephone.

Q. Can you state the substance of your conversations at the plant?

A. Can I refer to some notes I took at that time?

Q. Yes, sir. If by reviewing your notes you can tell us the substance of the conversation, will you do so, briefly?

Mr. Lesher: We have no objection to AB and AC.

The Court: They will be received.

(Defendant's Exhibits AB and AC received in evidence.)

A. May I proceed?

Mr. Briney: Yes, sir.

A. The notes I wrote at the time read as follows: "Called at the Swift & Company plant 950 East 17th Street, Tucson, Arizona. I arrived about 11:00 a.m. Inspected all of the refrigeration rooms

(Testimony of P. Z. Ray.)

and products. This was December 7th, this was after they had a chance to clean it out. Refrigeration room and product stored in them, there was a very strong odor of ammonia fumes in the air and all the products I inspected also seemed to smell strongly of ammonia. The main freeze meat room and freezer room were [166] the only rooms affected. The fresh poultry room was okay. Swift & Company was shipping fresh poultry out of it. I broke down Mr. ———," and put a long dash mark, because I don't remember Frank's name.

Q. I just want the substance of the conversation.

A. They told me that the fresh poultry was unaffected. I went into Mr. Craig's office and introduced myself and expressed my sorrow over what had happened, and he told me he felt it was something beyond our control and had told Mr. Snoke of the General Adjustment Bureau he felt we were reliable people representing one of the oldest and biggest companies in the business. Mr. Craig expressed his desire to get back into operation as soon as possible and wanted to know what he should do with the product that was affected. I told him I could not tell him what to do, as I had no authority to do so, but Mr. Snoke of the General Adjustment Bureau had called me about 9:00 o'clock and told me he had talked with Mr. Butler of the Bush Manufacturing Company of Riverside, California, and they were sending a man out today and I assumed it was their adjuster. He asked me

(Testimony of P. Z. Ray.)

to call as soon as I heard anything further, as they were anxious to make a decision on disposing of the affected product. We discussed what could be done with it and he felt a lot of the product could be salvaged, that bologna, cured sausage, salami, cheese, and so forth, would be okay. [167] We also inspected a case of butter. The carton smelled strongly of ammonia. Mr. Pier of Swift & Company tasted the butter and said it was okay and thought it would be all right to send out.

The Court: If there is no objection, why don't you put these notes in evidence.

Mr. Briney: All right.

Mr. Lesher: I have no objection.

Mr. Briney: I would offer them in evidence as the next numbered exhibit as being the records of the conversations referred to with Mr. Craig.

Mr. Evans: No objection.

The Court: Exhibit AD in evidence.

(Defendant's Exhibit AD marked in evidence.)

Q. (By Mr. Briney): Mr. Ray, subsequent to these discussions with Mr. Craig, the replacement of the units and the coils for the freezer room went ahead as you indicated before?

A. That's right.

Q. Did you ever have any conversations at any time with anybody representing Swift & Company to the effect—strike the question. Do you know Mr. Barrett? Did you know Mr. Barrett about that time?

(Testimony of P. Z. Ray.)

A. Yes, sir. I have known Mr. Barrett a number of years.

Q. Were you present at any conversations which he had [168] with Mr. Christianson at the Swift plant prior to the trouble in December, 1955?

A. I was over there when Mr. Barrett was in the process of putting those rooms in. He was the subcontractor putting the rooms in. He was building. He was putting the insulation and finish on the refrigeration rooms.

Q. Who was present other than Mr. Barrett, Mr. Christianson and yourself?

A. That is all I can recall being present, is the three of us.

Q. State your conversation at that time.

A. Mr. Barrett objected to using the type of product they were using. He called it by the trade name which I cannot recall, that they finished the wall with. He wished to use a mastic, a moisture proof mastic, and he stated to Mr. Christianson he used the product before and felt it wouldn't hold up on the walls and he wanted to use this mastic which he had had good experience with and Mr. Christianson told him it was a product from Swift & Company and they wanted to use it for experimental purposes.

Q. At that time or any other time prior to December 4, 1955, did you personally observe any flaking on the materials of the walls of the freezer room?

A. The first time I was in the plant after it

(Testimony of P. Z. Ray.)

was put in operation, I recall where the air blast comes off the [169] coils right directly on the ceiling it commenced to flake off. That was as far as I know before we had any ammonia leak whatsoever, because I was there about the time of the opening.

Q. Can you tell me whether Authorized Supply is an Arizona corporation, do you know anything about the status of their incorporation?

A. No, I don't know.

Q. At all times during 1955 was it doing business to your knowledge in the State of Arizona, Authorized Supply Company?

A. As near as I remember they were during '55.

Q. Mr. Ray, the refrigeration coils that were put into the freezer room initially, the Bush coils, was there anything dangerous about them, if they are defective, that type of equipment, anything about them that is dangerous to persons or property if they leak or are defective?

A. Well, the coil is not dangerous, the ammonia fumes themselves are dangerous if you have—if you can't get away from them.

Q. In your experience, ammonia free will cause damage to persons and property, both?

A. If it is free it will.

Q. Was it Mr. Robertson or yourself that dealt primarily with Authorized Supply Company in connection with the purchase [170] of the original coils? A. Mr. Robertson.

Mr. Briney: That is all.

(Testimony of P. Z. Ray.)

Cross Examination

Q. (By Mr. Evans): I think you said, Mr. Ray, that the replacement coils were installed on the 27th and 28th of December, 1955?

A. That is what our labor ticket shows.

Q. That probably would be accurate?

A. That is when the men worked on it, was during those two days.

Q. Of course, at the time that was done, you knew the extent of the damage that had happened at the plant by reason of the leak in the original coils?

A. Not the total extent, but we knew shortly thereafter the total extent.

Q. I thought the letter Mr. Briney showed you from Mr. Craig that had the list——

A. That was my first knowledge of the total.

Q. Of the total dollar-wise?

A. That's right.

Q. I notice that is dated December 23?

A. That's right.

The Court: What exhibit? [171]

Mr. Evans: Exhibit W, dated December 23, and attached to that was a list that purported to show the extent of the damage to the meat products down there?

A. That's right.

Q. (By Mr. Evans): That of course is apparently prior to the time that the replacement coils were installed?

A. That's right. They hadn't arrived.

(Testimony of P. Z. Ray.)

Q. You never at any time had any conversation with Mr. Craig in which you told him that if Swift & Company would forget its claim against your company or any other person for its damage to the meat products, you would put in new coils, did you?

Mr. Briney: I object as immaterial.

The Court. You may answer.

A. Restate that question.

Q. (By Mr. Evans): You at no time prior to the installation of these new coils had any conversation with Mr. Craig in which you told him or intimated to him in any way that if Swift & Company would give up any claim it had against your company for the damage to its meat products, that your company would at their own expense, install new coils?

A. No, I never had no such conversation.

Q. No conversation. It never entered your mind to do so?

Mr. Briney: I object whether it ever entered his mind. [172]

The Court: That would be immaterial.

Q. (By Mr. Evans): I think you stated that when you learned that the Krack coil was not available right away, that you went to Mr. Christianson and reported that to him?

A. Mr. Robertson did, not I. I reported to Mr. Robertson they were not available.

Q. But you could get an equal coil that would do the job, just as well?

(Testimony of P. Z. Ray.)

A. We could get the other coils and he said he was glad to get them.

Q. Because he was in a hurry? A. Yes.

Q. Of course it was indicated those would do just as well as the other ones?

A. As far as we knew they would.

Q. I think Mr. Briney asked you or you stated to him when these replacement coils were installed by your company in the latter part of December of '55, that there was no charge made to Swift & Company for that installation or for those replacement coils? A. No, they were not.

Q. And likewise, no credit was given to them or no reimbursement of any type?

A. No. There was no transaction of any kind as far as I know. [173]

Q. Your dealings with Swift & Company up through February of 1956 consisted that you do the work that was required under the contract, that you had some extra work that was agreed upon subsequent to the making of the original contract, the prices were agreed upon, you did the work and Swift & Company paid you or paid Arizona York and Southern Arizona York the agreed amount?

A. I don't know. You covered so much ground there I don't know if I got it all or not.

Q. Arizona York made an agreement to do a certain job for a certain price?

A. That's right.

Q. That job was done and Swift & Company

(Testimony of P. Z. Ray.)

paid for it? A. That's right.

Q. There was also in addition to the original job, some extras? A. That's right.

Q. They were agreed upon and that work was done either by Arizona or by Southern Arizona and Swift & Company paid for that?

A. That's right.

Q. As far as contract payments were concerned, at the end of January, 1956 or February, 1956, your scores were settled as far as owing any money from Swift & Company to you [174] on the contract?

A. I don't know when the final payment came in.

Q. I think the check showed February 2, 1956. Would that be about right?

A. I would say something like that.

Mr. Evans: That is all.

Mr. Briney: I have no further questions.

We will rest, if the Court please, at this time.

Mr. Lesher: Your Honor, at this time I would like to make a motion on behalf of the Third Party Defendant Authorized Supply Company for judgment in its favor on the third party complaint on the ground first that there is no competent evidence in the record to support a judgment on either count of the Third Party Complaint. First of all, there is to the extent that the complaint, that is, the second amended third party complaint is based upon negligence, there is, of course, no showing of negligence in any way. Neither is there any showing either under negligence or under warranty of any proper damages. There is no evidence

from which the proper measure of damages can be ascertained. On the further ground perhaps more fundamental, that the evidence in the case affirmatively shows, first, that the only warranties made by the third party defendant to the defendent were implied warranties made under the Uniform Sales Act and that by return of the coils to the third party defendant and the acceptance [175] of replacement coils from the third party defendant, the defendant, that is, the Southern Arizona York and Arizona York and/or Arizona York, made a binding and conclusive election of remedies by which this second amended third party complaint is barred.

I am a little impressed with the probable futility of adding to what the Court already knows about the law on this one, but I ask leave to file in support of the motion, this memorandum, copies of which have already been handed to counsel, which goes only to the point last made, that the evidence shows binding and conclusive election of remedies. I think the law in Arizona is quite clear. There is some authority to the contrary which authority is cited in the memorandum together with what I think is the overwhelming weight of authority supporting the third party defendant's position.

Two cases in Arizona, of which the Court is undoubtedly aware take the position along with the great majority of the courts, that the return of the product purchased and the acceptance of a substitute product is under the Uniform Sales Act a binding and conclusive election of remedies and

thereafter a breach of suit for consequential damages based on the breach of warranty is barred.

The Court: Motion denied.

Mr. Briney: If the Court please, I would again urge the motions that I presented at the end of the plaintiff's [176] case for judgment in favor of Arizona York and Southern Arizona York and against the plaintiff on both counts one and two of the complaint for all the reasons urged at the conclusion of the plaintiff's evidence.

The Court: That motion is denied also.

Mr. Lesher: Your Honor, the third party defendant will present no evidence, and rests.

The Court: Is there any rebuttal?

Mr. Evans: I have no rebuttal, your Honor.

The Court: That is all the evidence then?

Mr. Evans: Yes, sir.

The Court: I would like counsel to brief the matter, and how much time do you gentlemen desire?

Mr. Evans: My only problem is I have a pretty good schedule of trials for the next few days.

The Court: Let me say this, Mr. Evans, it may help all of you. I am going to be going to Prescott on the 2nd of July. I am not going to be able to push the thing through. I will be pretty well taxed getting ready to go and clean up matters here. I like to get these matters decided promptly, but there is no point in your rushing briefs when I can't get to it anyway.

Mr. Evans: May I suggest that we have 15 days in which to file our brief? Do you want to do them simultaneously or responding? [177]

The Court: I think it best they be responding in this instance. Supposing the plaintiff is given 15 days, the defendant 15 days to answer, and to open as to the third party defendant. The third party defendant, 15 days, and then both the plaintiff and defendant 10 days after that for the final brief.

Upon the filing of the briefs, the matter will stand submitted. [178]

[Endorsed]: Filed November 24, 1958.

[Endorsed]: No. 16274. United States Court of Appeals for the Ninth Circuit. Authorized Supply Company of Arizona, a Corporation, Appellant, vs. Swift & Company, a Corporation, Arizona York Refrigeration Company, a Corporation, and Southern Arizona York Refrigeration Company, a Corporation, Appellees. Arizona York Refrigeration Company, a Corporation, and Southern Arizona York Refrigeration Company, a Corporation, Appellants, vs. Swift and Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Arizona.

Filed: December 1, 1958.

Docketed: November 10, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16274

AUTHORIZED SUPPLY CO. OF ARIZONA,
Appellant,

vs.

SWIFT AND COMPANY, et al., Appellees,

and

ARIZONA YORK REFRIGERATION CO., et al.,
Appellants,

vs.

SWIFT & COMPANY, Appellees.

STIPULATION AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL

It is hereby stipulated by and between counsel for all of the parties herein that the Record on Appeal shall be, and is hereby, designated to be that record heretofore designated as the Record on Appeal in the U. S. District Court for the District of Arizona in that cause, No. Civ-909-Tuc, entitled Swift & Company, a corporation, plaintiff, vs. Arizona York Refrigeration Company, et al.

BOYLE, BILBY, THOMPSON AND SHOENHAIR,
/s/ By RICHARD B. EVANS,
Attorneys for Swift & Company.

DARNELL, HOLESAPPLE,
McFALL AND SPAID,
/s/ By RICHARD C. BRINEY,
Attorneys for Arizona York Refrigeration Co. and
Southern Arizona York Refrigeration Co.

MAY, LESHER & DEES,
/s/ By ROBERT D. LESHER,
Attorneys for Authorized Supply
Company of Arizona.

[Endorsed]: Filed December 24, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF POINTS ON WHICH APPELLANT AUTHORIZED SUPPLY CO. INTENDS TO RELY ON APPEAL

In accordance with the provisions of Rule 75 (d) of the Rules of Civil Procedure and of Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit, the appellant Authorized Supply Company states the following as the points on which it intends to rely in this appeal:

1. The Third-Party Complaint is based upon the alleged breach of an implied warranty held to exist in this case by virtue of Section 44-215 (1) of The Arizona Revised Statutes of 1956. In point of fact, the sale by this appellant (the Third-Party Defendant) to the plaintiff Southern Arizona York Refrigeration Company, of certain refrigeration coils later found to be defective was a sale of a speci-

fied article under its patent or other trade name, under Section 44-215 (4) of ARS, 1956, to which sale no warranty of fitness attached. The trial court therefore erred in finding that this appellant warranted the fitness of the coils to the defendant and third-party plaintiff.

2. Even if the sale was made under Section 44-215 (1) of ARS, 1956, with an implied warranty of fitness attaching, the third-party plaintiff waived its cause of action here sued on by making an election of remedies inconsistent with it. When the coil was found to be defective, causing the damage to plaintiff's property, on which the Complaint is based, third-party plaintiff returned it to third-party defendant, which replaced it without cost with a new unit. The return of the defective unit and acceptance of the replacement constituted a binding and conclusive election of remedies under ARS, 1956, Sec. 44-269, (Uniform Sales Act, Sec. 69), barring third-party plaintiff from thereafter seeking damages for consequential damages flowing from the defect in the original coil. The court therefore erred in awarding such consequential damages against third-party defendant in this action.

The record being presently unavailable for scrutiny of counsel, the page numbers upon which material pertinent to the points set out above may be found in the record cannot be determined. The documents particularly involved, however, are the trial court's findings of fact, 6, 7, 10 and 11, and his conclusions of law, 3, 4, 5 and 7, as they appear

in the record, and upon testimony of record in the transcript of proceedings, page numbers which are also presently unavailable to counsel.

MAY, LESHER & DEES,
/s/ By ROBERT D. LESHER,
Attorneys for Authorized
Supply Co. of Arizona.

Notice of Mailing Attached.

[Endorsed]: Filed December 24, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS OF APPELLANTS ARIZONA YORK REFRIGERATION COMPANY AND SOUTHERN ARIZONA YORK REFRIGERATION COMPANY

This appeal of Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company is taken in order to obtain a reversal of the judgment against said appellants in favor of defendant-appellee Swift & Company in the event the Court should rule favorably upon the appeal of Authorized Supply Company and against appellees Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company. The points upon which appellants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company will rely on appeal are:

1. The court erred in finding and entering its conclusion of law that Arizona York Refrigeration Company expressly warranted the fitness of the refrigeration system and component parts sold by it to plaintiff Swift & Company.

2. The court erred in finding and entering its conclusion of law that Arizona York Refrigeration Company impliedly warranted to Swift & Company the fitness of the refrigeration system and component parts sold to it.

3. The court erred in entering its conclusion of law that the defects in the bush coils which caused the escape of ammonia gas into plaintiff's plant on or about December 5, 1955, constituted a breach of express and implied warranties running from these appellants to plaintiff Swift & Company.

4. The court erred in finding that plaintiff and defendant Arizona York Refrigeration Company understood and contemplated that loss and damage to plaintiff's meat products would be the natural and probably consequence of a failure of the refrigeration system.

5. The court erred in finding and entering its conclusion of law that plaintiff did not elect a remedy which was inconsistent with the cause of action stated in the amended complaint, and did not thereby waive its cause of action by accepting the new Bush coils in place of the defective coils. Such replacement and return of the defective coils effected a binding and conclusive election of reme-

dies, which barred plaintiff from seeking or recovering consequential or any damages.

6. The court erred in refusing to grant judgment in favor of defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, and against plaintiff Swift & Company, for the reasons more particularly referred to in 1 through 5 above.

The original certified record is not presently available to the undersigned attorneys, and the page numbers of said record cannot be set forth herein as required by the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit. The foregoing Statement of Points is particularly directed to the trial court's Findings of Fact Nos. 4, 7 and 11, and Conclusions of Law Nos. 2, 4, 5 and 6, together with the testimony contained in the transcript of proceedings and the pleadings of record.

DARNELL, HOLESAPPLE,
McFALL & SPAID,
/s/ By RICHARD C. BRINEY,

Attorneys for Appellants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company.

Notice of Mailing Attached.

[Endorsed]: Filed December 26, 1958. Paul P. O'Brien, Clerk.

No. 16282

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,

Appellants,

vs.

SANDRA MAE NIHILL, etc.,

Appellee.

Opening Brief of Appellant Arnold L. Lewis, Doing Business as Studio Cosmetics Company.

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Appellants,

vs.

SANDRA MAE NIHILL, etc.,

Appellee.

Opening Brief of Appellant Arnold L. Lewis, Doing Business as Studio Cosmetics Company.

This is an appeal from a judgment for $48,000.00 in favor of appellee upon the verdict of a jury, in an action for damages for personal injuries, brought by Sandra Mae Nihill, a minor, against appellant, Arnold L. Lewis, the manufacturer of a home permanent wave preparation, and appellant Rexall Drug Company, a corporation, the vendor of the product.

The appellee's mother claimed to have purchased a home permanent wave kit from a Rexall Drug Store in Kensal, North Dakota. The home permanent was thereafter administered to the plaintiff who started to lose hair approximately a week to ten days later. Ultimately, and after a period of approximately four to five months, she lost most of her hair. It is claimed that such loss is permanent.

The judgment was entered on April 29, 1958 [p. 90].

A motion for judgment notwithstanding the verdict or for a new trial was filed on April 21, 1958 [pp. 82-84] and the motions were thereafter denied on June 26, 1958 [p. 91].

A stipulation and order fixing bond on appeal was filed on July 29, 1958 [p. 94].

A statement of points on appeal on behalf of appellant Lewis was filed on December 18, 1958 [p. 811].

Jurisdiction was vested in the District Court by reason of a diversity of citizenship between the appellant and the appellee, the appellee at all times being a resident of the State of North Dakota [pp. 11; 198]. The appellant Arnold L. Lewis was at all times a resident of the State of California [p. 29] and the defendant Rexall Drug Company, a corporation, was a Delaware corporation authorized to do business in the State of California [p. 28].

The Constitution of the United States expressly provides for the jurisdiction in the District Courts of suits between citizens of different states where the sum sought is in excess of $3,000.00. Here the prayer of the complaint was in the sum of $250,000.00 [p. 14].

Williams v. Greenbay & W. R. Co., 66 S. Ct. 284, 326 U. S. 549, 90 L. Ed. 311.

An appeal from the final judgment of the United States District Court to the United States Court of Appeals is authorized by the provisions of the Judicial Code, 28 U. S. C. A. 1291.

Summary of Argument.

The evidence fails to establish *actionable* negligence on the part of appellant manufacturer, Arnold L. Lewis. Actionable negligence embraces the concept of duty, breach of that duty and injury *proximately* resulting from a breach of the duty. Although appellee contends that the appellant, Arnold L. Lewis, the manufacturer of the home permanent wave in question, was guilty of negligence in manufacturing the product, they produced not a scintilla of evidence to support the proposition that there was any defect in the preparation or compounding, manufacture, sale or distribution of this product. No negligent *act* of any character can be tortured out of the evidence. Plaintiff's case is shrouded in speculation and conjecture.

The absence of any direct or indirect evidence of negligence in the manufacture of the product precipitated plaintiff's request for an instruction on the doctrine, *res ipsa loquitur*. Appellant contends that this doctrine, under the well settled principles applicable thereto *cannot* be applied in this case and that in any event the form of the instruction was prejudicially erroneous.

The trial court over objection also instructed the jury on the doctrine which related to the duty of a manufacturer of a product that is *inherently dangerous,* or reasonably certain to be dangerous if negligently made. The record is devoid of any evidence which would justify the giving of this instruction.

Merrill v. Beaute Vues Corp., 235 F. 2d 893 (C. C. A. 10).

Particularly prejudicial was the action of the trial court in permitting, over objection, the testimony of two

witnesses, who claimed to have used a home permanent manufactured by appellant, under circumstances which are not shown to have been even remotely similar, *and where the alleged results were not* shown *to have been the same or similar.*

Appellant contends that a verdict of $48,000.00, based upon the paucity of the medical evidence produced, even assuming liability, was excessive as a matter of law.

It is appellants contention that the verdict of the jury is utterly without support in the evidence and that the trial court committed error in the various respects hereinabove specified and in particular erred in refusing to direct a verdict for appellant, or in lieu thereof, refusing to grant appellant's motion for a judgment notwithstanding the verdict.

Specification of Errors.

The Specification of Errors are contained in the Statements of Points relied upon and are as follows:

1. The evidence was insufficient as a matter of law to establish any actionable negligence against the appellant manufacturer and the implied finding of the jury in that regard cannot be supported.

2. The trial court committed prejudicial error in instructing the jury over appellant's objection on the doctrine of *res ipsa loquitur;* and in any event the form of the instruction on this doctrine was prejudicially erroneous.

In conformity with Rule 18, the instruction on *res ipsa loquitur* is herewith set forth in full:

> "It is your duty to consider and make up your verdict from all the evidence in the case, taking

into consideration the rule of evidence that I will now give you. That rule of evidence is known as *res ipsa loquitur,* that is to say, the thing speaks for itself, and that rule of law is recognized by the Courts as the law in cases similar to this.

"That if you should believe, from the evidence in this case, that Sandra Nihill suffered an injury as a proximate result of the application of the Cara Nome Pin Curl Wave, and, if you should believe from the evidence, that in the application of this product she used all of the instructions put out by the defendant manufacturer, Studio Cosmetics Company, and properly and clearly followed same, as put out, and that no tampering had been done with it, and that nothing else caused her injuries, or her condition, then, under the law, you are authorized to draw the inference of negligence, and by that is meant this:

"That the rule of evidence applies where the plaintiff cannot have or be expected to have any information as to the manufacture or the ingredients or the effect of the home wave product used, or have any information as to what might result from the use thereof, whereas the manufacturer, Studio Cosmetics Company, must be assumed to have full information of all of these subjects and know just what material and what workmanship were used, and what the effects upon a human being might be from the use of these materials and failed to make known these things to the plaintiff and to the public. That is so particularly where the event following the use of the product is shown to be that ordinarily not expected to occur when the manufacturer uses due

care in the manufacture of such a product, and it is not necessary for the plaintiff to go further and prove particular acts of omission or commission on the part of the manufacturer from which the event resulted, but the event itself makes proof of inference of negligence on the part of the manufacturer from which the jury may infer that the manufacturer was negligent, if the plaintiff has shown by a preponderance of the evidence that the product was manufactured by the defendant and that all instructions put out by the defendant for its application were followed substantially by the one using it, and that the one using such product was injured as a result of using it, then that inference of negligence arises, but it is not conclusive; it is an inference of negligence that the plaintiff is entitled to have received without further proof."

Prior to the giving of any instructions, a conference was had between counsel and at that time the court indicated that it would give the instruction on *res ipsa loquitur*.

Appellant's counsel objected to the giving of any instruction at said time [p. 721]. Thereafter the following specific objection was made to the quoted instruction after the same had been given, in accordance with the Federal rules:

"Mr. Packard: Let the record show the defendant Studio Cosmetics, Arnold L. Lewis, doing business as Studio Cosmetics, objects to the giving of Plaintiff's Amended Instruction Request No. 6, which is an instruction based upon the doctrine of *res ipsa loquitur*. I have thoroughly gone into the matter, I believe, in my motion for non-suit and directed ver-

dict. I feel that the instruction is not applicable in a situation where there is testimony of several plausible causes, one of which the defendant would not be responsible or liable. Secondly, I object to the giving of the instruction. The instruction itself is ambiguous, uncertain, it doesn't properly instruct the jury on the doctrine of *res ipsa loquitur,* and it does not submit to the jury the doctrine of *res ipsa loquitur* as a question of fact, but submits the matter to the jury upon a finding by the court as a matter of law that the doctrine is applicable. I object to the giving of the instruction and I state that it is error to give the instruction and further that it was improperly submitted—

The Court: It was the intention of the court to submit certain of the questions upon which the doctrine was based to the findings of the jury.

Mr. Packard: Well, I feel that it does not submit the question of control or the elements of the doctrine of *res ipsa loquitur* as a question of fact, or whether it was a type of result which would normally follow in the course of human events, it's not for the negligence of the defendant, and the other requisites for the doctrine have not been given in the instruction; that it's uncertain in that they refer to 'if you find from the evidence that Sandra Nihill suffered an injury as a proximate result,' there's an inference of negligence, and it's uncertain as to what you refer to by an 'injury' in the case. Further, the instruction contains the language 'that is so, particularly where the event following the use of the product is shown to be that ordinarily not expected,' and it's uncertain as to what is referred to as 'event following,' and I believe it fails to in-

struct what proximate cause is. I want the record to show that we object to the instruction—plaintiff amended instruction No. 6—on those grounds, not limiting our objection to those grounds, but claim the doctrine is not applicable."

3. The trial court committed prejudicial error in instructing the jury on the liability of a manufacturer of a product which is inherently dangerous.

The Court instructed the jury as follows:

"You are instructed that the manufacturer of a product that is either inherently dangerous, or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly invited by the manufacturer. Failure to fulfill that duty is negligence."

Specific objection was made to the giving of this instruction at the appropriate time, as follows:

"Mr. Packard: Then I wish to except to plaintiff's jury instruction No. 7, which states that the manufacturer of a product that is inherently dangerous, or reasonably certain to be dangerous if negligently made, owes a duty to warn, and so forth, upon the basis that there's no evidence in this record to show that the product in question was inherently dangerous. The only evidence shows that it is an alkali, that the contents are not as strong as those contained in a lot of normal home soaps and there's

no evidence whatever to show that the solution made in any particular concentration would be toxic or have ill effects. I object and except to that."

4. The trial court committed prejudicial error when it permitted the reading over appellant's objection of the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, where there was no foundation laid to show a sufficient similarity of conditions.

In compliance with Rule 18, appellant sets forth the substance of the evidence admitted over his objection.

Mrs. Donald Carlson testified that she bought a Cara Nome home permanent set at the Kensal Rexall Drug Store some time in March of 1955 [p. 527]. She did not describe the type of home permanent kit that she bought. She claimed that after the permanent wave, her hair was strawy and dry and the ends were funny colored, more or less, they were lighter on the ends than they were at the scalp. The ends were split and she finally had her hair cut [p. 528]. She noticed nothing unusual about the smell other than it was similar to most permanent solutions [p. 529]. She did not notice any difference in the effect of the solution on her hands as compared with other home permanent wave solutions that she had used. She suggested that it rusted the bobby pins. At the time her deposition was taken she had a full head of hair [p. 531].

Mrs. Carl Carlson testified that she also purchased a Cara Nome permanent kit. She noticed that after the wave her bobby pins were rusting and she seemed to have two colors of hair. Some of the hair broke off [p. 535]. She had her hair cut and had no further problem [p. 537].

To this evidence, objections were repeatedly made [p. 448]. Finally the court decided that it would be reversible

error to permit the reading of the depositions [p. 458] and refused to permit their reading. Subsequently a motion to reopen the case was made for the purpose of again offering the depositions [pp. 475, 476]. Objections were made upon the ground that there was no proper foundation laid, to show that the product used by the Carlsons was out of the same batch [p. 451]; there was no foundation laid to show that the conditions under which the waves were given was substantially the same [p. 452]. There was no foundation laid to show that the Carlsons used the pin curl permanent as distinguished from some other type of permanent; that the results were entirely different; that neither of the women had any loss of hair such as claimed by the plaintiff. There was some breakage, it was trimmed off and it grew out and they are perfectly all right [pp. 452, 453]. Further objections upon these same grounds were made at pages 476, 477 and 478.

5. The damages awarded by the jury's verdict were clearly excessive.

6. The trial court erred in denying the appellants' motions for judgment under Rule 50(b), Federal Rules of Civil Procedure [p. 82].

Statement of the Case.

A. The Product, Cara Nome Natural Curl Pin Curl Permanent.

Appellant, Arnold L. Lewis, was the manufacturer of a product known and sold as Cara Nome Natural Curl Pin Curl Permanent [p. 29].[1] Lewis sold the product to

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[1]This was one of five types of home permanent kits manufactured by Appellant Lewis. The other kits contained the same chemicals but in different proportions [p. 651]. Each kit was designed for a special purpose [p. 652].

appellant Rexall Drug Company. He had been a cosmetics manufacturer since 1936 [p. 649] and had been in the beauty supply business since 1929 [p. 649]. He had been president of the California Cosmetic Association on two separate occasions [p. 650] and was obviously qualified in his field.

The cold waves first made their appearance on the American market in 1941 [p. 650]. Lewis was thoroughly familiar with the cold wave solutions put on the market, not only by himself but by others [p. 650]. Apparently the large manufacturers operate pursuant to a licensing agreement under the "McDonald" patent which permits them to use a preparation known as Ammonium Thioglycolate [pp. 651, 673]; which is the basic ingredient of all cold wave preparations [p. 650].

Actually Lewis was unable to satisfy the demand and made arrangements with the Toni Company for additional manufactured units pursuant to the same formulation [p. 658]. Lewis also manufactured cold waves for other companies under various brand names [p. 659]. He furnished the kits for Rexall ever since 1946, although, at one time a different brand name was used [p. 658].

On an average Lewis marketed about 450 thousand kits a year [p. 660]. Of this number approximately 45,000 were of the "pin curl" variety [p. 676].

Each batch is carefully prepared under the supervision of a chemist and the "thio" content is determined by chemical titration and the PH by an electrical device known as Beckmans meter. These results are recorded and form a part of the records of the company [p. 654].

Batch No. 181, a pin curl batch, is claimed to have been the batch from which the pin curl kit used by appellee

was manufactured [see Deft. Ex. G, p. 657]. This batch produced 10,400 bottles of the pin curl preparation which was shipped, 50 per cent to a Rexall distribution center in Chicago and 50 per cent to a Rexall distribution center in Georgia [p. 660]. The company chemists analysis revealed, for this batch, the following contents: Ammonium thioglycolate, ammonium hydroxide, opacifier, distilled water, triton 200 and perfume. The "Thio" content was 7.07 per cent, free ammonia 85 per cent, and the PH 9.3 per cent. There is not one scintilla of evidence that these chemicals, in these proportions or *any other,* are harmful to hair or scalp of normal human beings.[2]

The evidence is uncontradicted that all cold wave solutions contain "as small an amount as three per cent of calculated thioglycolate acid, *and as high as 10 per cent* [p. 590]; that the normal is, "of the order of seven per cent" [p. 591]. Dr. C. E. P. Jeffreys, an eminently qualified consulting chemist [pp. 588-589] analyzed a sample from batch No. 181 and found 6.94 per cent of thioglycolate acid. In addition the PH factor was 9.2 per cent [p. 592]. This is a measurement of the alkalinity factor—so that actually the cold wave, even though thioglycolate *acid* is used, is actually alkaline [p. 592]. Other cosmetics on the market have higher PH factors than the cold wave; soap for example, with a PH factor of 10 per cent [p. 593]. Thioglycolate is toxic if *consumed by mouth,* but not *"by putting it on your skin"* [p. 607].

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[2]Plaintiff produced *no chemist.* Not one of plaintiff's doctors (Martin, Melton or Levitt) ever suggested that the percentage of thioglycolate contained in batch No. 181 was excessive for use on the hair or scalp of normal human beings. It is particularly interesting to note that after plaintiff had retained an attorney, she purchased at the same drug store, a similar kit, with the lotion produced from batch No. 191, [Pltf. Ex. No. 34], but no effort was made by plaintiff to have this analyzed.

A pin curl permanent is intended to be casual type of permanent and has a thioglycolate content of 6½ per cent to 7½ per cent, with a PH of approximately 9.3 per cent [p. 653].

Appellant Lewis has continued to use the same formula [p. 659] and no complaints were made by anyone arising out of the particular batch No. 181 and *no one* ever claimed (other than plaintiff) that they had any *permanent loss or damage to their hair* [p. 659]. Mr. Stark of Rexall testified that in the handling of *all* Cara Nome products, about 400,000 a year, Rexall would average about 8 claims a year, allegedly due to cold waves [p. 642]. In all of these claims the only contention made was that there was a *breakage of hair* [p. 642]. *No claim was ever presented other than appellees,*[3] *for an alleged total, permanent and complete loss of hair* [p. 643].

B. The Plaintiff Sandra Mae Nihill.

On February 5, 1955, plaintiff was 13 years of age, and lived with her parents on a farm outside the small town of Kensal, North Dakota [p. 399]; population 350 [p. 539]. On that day plaintiff and her mother went to town and claim they purchased a kit of Cara Nome Natural Curl Pin Curl Permanent [p. 400].

Prior to this time plaintiff had been given other home permanents [pp. 199, 225]; one of them was a Toni, although she did not recall the type [p. 225]. Plaintiff

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[3]As might be expected with any preparation having such a tremendous market among American women, there are a few reported cases dealing with "thio." See for example: *Briggs v. National Industries,* 92 Cal. App. 2d 542; 207 P. 2d 110 and cases *infra.* No appellate decision in the United States has been found where a *complete permanent* loss of hair has ever been claimed to follow the use of this product.

claimed to have been in good health prior to February 5, 1955 [p. 199]. She denied any diseases of the skin [p. 199] or other illnesses requiring medical care [p. 199]. She was sensitive to sunlight and excoriated or scratched her skin often [pp. 613, 629]. This would tend to indicate allergy [p. 629].

She was in the eighth grade [p. 199] and about a week before February 5th was examined by Dr. Clarence S. Martin, for the high school, along with a number of other high school girls who were to play in a tournament [p. 311]. After the regular basketball season, the plaintiff was to participate in a basketball tournament between the various schools. A simple physical examination was made to plaintiff about a week before February 5th to determine if she could play [pp. 222-223]. Plaintiff wanted to look nice so she could play in the tournament [p. 230]. Dr. Martin, at that time, merely examined her heart, the appearance of her skin, the throat, checked for fever, blood pressure and general appearance [p. 319]. He kept no notes of this visit and did not examine her scalp. Prior to this visit, she showed no sign of allergy that he observed [p. 310]. This doctor did not at this time, or later, ever test plaintiff with any standard allergy tests or with any specific chemicals, cosmetics or soaps [p. 318].

No comprehensive tests of any type had ever been run on plaintiff prior to February 5, 1955. Her *true* systemic condition is unknown and the suggestion that she was a normal, healthy girl is based upon the kindly observation of her lay relatives, friends, and her small town family and school doctor. It is interesting to note that after July of 1955, a Dr. Melton, to whom the plaintiff had been referred by Dr. Martin of Kensal, prescribed for her a thyroid preparation [pp. 545, 271], which was dis-

continued, not by the doctor, but by the mother, because she thought it was making the girl too fat.

Expert medical testimony from Dr. Starr, also indicated that plaintiff had clinical evidence of a "hypothyroid" state [p. 575]; dryness of the skin and scalp, *overweight,* poor quality of the fingernails [p. 547], sparseness of hair [p. 554] are all symptoms of an underactive thyroid. It must be assumed that plaintiff's own doctor, Dr. Melton had these considerations in mind when he prescribed the thyroid for plaintiff.

C. The Cold Wave—The Administration.

After the purchase of the home permanent kit, plaintiff was given a permanent by a neighbor, Mrs. Briss. The mother timed the various steps. All claimed that the directions were followed to the letter, although actually the record demonstrates considerable failure of recollection in this regard, and much conflict. The instructions are set forth verbatim in Appendix B.

The home permanent is given in the following fashion:

1. The hair is shampooed[4] and then set in tight pin curls.

2. One half of the pin curl lotion is poured from the bottle into a clean glass or china dish, and with cotton or an eye dropper, each pin curl is saturated with the fluid.

3. There is then a wait of ten minutes, during which time the neutralizer is mixed in a glass bowl or jar by adding the powder to one quart of water.

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[4]No one knew what type of soap or shampoo was used [p. 238]. The evidence demonstrates that many soaps have a higher PH factor than the product in question. For an example of claimed injury from soap products, see *Worley v. Proctor & Gamble Mfg. Co.,* 253 S. W. 2d 532 (Mo. App.); *Proctor & Gamble v. Superior Court,* 124 Cal. App. 2d 157, 268 P. 2d 199.

4. At the conclusion of the ten minutes, the pin curls are again saturated with the remainder of the pin curl lotion in the same manner as previously.

5. There is another wait of ten minutes, at the conclusion of which a test curl is run. If the test curl shows wave ridges, the neutralization should immediately take place.

6. This process is accomplished by placing a fine net over the curls, rinsing or spraying several times with warm water and then blotting. Half of the neutralizer solution is poured into a clean bowl and with fresh cotton, each curl is saturated. This is followed by a 5 minute wait, after which the remaining neutralizing solution is poured through the hair, caught in a bowl, and each curl saturated with cotton. After this there is another ten minute wait, the hair is then thoroughly rinsed with water, blotted dry, and when completely dry, the pins, net and curlers are removed and the hair combed out. See instructions, Exhibit 1A, page 681, Appendix B.

The uncertainties of the plaintiff's recollection in regard to the manner of the application of the wave are clearly reflected in the transcript on page 264.

The testimony of Mrs. Jorgenson, aka Mrs. Briss, demonstrates an utter failure to follow the directions. She testified that according to the directions, she was to use half of the wave solution, first being dobbed on each individual pin curl [p. 298]. That after this she was to throw away whatever remained in the dish and add the other half of the bottle [p. 299]. That she was then to take the bowl, with the other half of the bottle, and *pour it all over the* head [p. 299].

This is contrary to the instructions and would constitute a wrong method of application. See testimony of Arnold Lewis [p. 666].

The importance of this testimony is obvious and apparent. It was the contention of plaintiff's counsel at the trial that in giving this testimony, Mrs. Jorgenson had reference to the neutralizer rather than to the pin curl solution. Certainly different inferences can be drawn. It may well be that actually the wave was given as described by Mrs. Jorgenson in the deposition, and that as a result, the hair was *never neutralized at all.*

It is significant that during the course of treatment there was no complaint of any burning sensation [pp. 237; 265]. The only complaint that plaintiff had was that "it was about two weeks or so after we got the permanent when I first noticed it coming out" [p. 212]. It started coming out when she combed it [p. 212]. There was no complaint of pain on the scalp [p. 361] either at the time, or during the period before she saw Dr. Martin on February 28. There was no complaint of itching or irritation of the scalp or eyebrows or eyelashes.

Finally, on February 28, 1955, 23 days after the alleged administration of the permanent wave, the plaintiff went to see Dr. Martin at Kensal [p. 311].

Dr. Martin's Treatment.

Dr. Martin did not examine any of the hairs under a microscope to determine whether any of the ends were frayed [p. 322]. He does not suggest that there was any *visible* evidence of damage to the hair shafts at that time. There is no suggestion of any splitting of the hair, or *breaking of the hair* [p. 361] or change in the color or texture of the hair. At first, the amount was not signifi-

cant, "Well, just when you put the comb through there would be *some* in the comb" [p. 267].

Dr. Martin's examination showed extensive loss of hair, some areas of inflammation, with *scaling*[5] and dermatitis [p. 310]. He examined her scalp with a Woods light and found no evidence of fungus and prescribed a *prescription* drug (Abbotts) known as Selsum *"for the treatment of Seborrheic dermatitis* [p. 311]. According to plaintiff's Dr. Melton, Selsum is not used in a case of chemical injury of the hair or scalp [p. 344]. He made *no tests* for any allergy and in particular did not test for allery with thioglycolate [p. 318]. Specific instructions were given to the plaintiff regarding the use of the product, Selsum [p. 320]. She was to apply it *once* a week, after a soap shampoo of the hair, massaged into the scalp for five minutes, allowed to stay there for that time, and then rinsed out, and then it is used again for another five minutes and allowed to stay there for that length of time and then rinsed out thoroughly with several rinsings of water so that you *do not leave* any of the medication on the scalp [p. 320]. The doctor conceded that Selsum *"could cause falling hair,* but *it is a medicine that is not to be left on the scalp* [p. 320].

Plaintiff did not see any doctor between her visit to Dr. Martin on February 28, 1955, and July 6, 1955, a period of over four months [p. 315].

Plaintiff used the Selsum *the same day* it was prescribed [p. 245] and continued to use it *until her hair was gone* [p. 247]. Despite the rather *explicit* directions from Dr. Martin as to the use of Selsum, the plaintiff could not re-

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[5]There is no evidence anywhere that "scaling," *i.e.,* dandruff, or Seborrheic dermatitis [p. 373] has ever been known to have been caused by thioglycolate [p. 359].

member if she washed her hair before applying it [p. 246]. She could not even recall the nature of the medication, *i.e.,* whether paste or liquid [p. 268]. She did not personally apply the Selsum, but it was applied by her eldest sister [p. 269] who was never called as a witness. *She could not recall how her sister applied it to the head* [p. 269].

It is interesting to note that on the occasion of the first visit to Dr. Martin he did not seriously regard her problem; did not make another appointment and did not see her again for over four months. There is nothing to indicate in Dr. Martin's testimony that *at the time* of his original treatment he was of the opinion that the thioglycolate was even remotely to blame for the condition which he discovered. There was never any history of a chemical burn, mild or otherwise. (See Testimony of plaintiff's Dr. Levitt) [p. 369]. The slight redness described by Dr. Martin on the occasion of the visit of February 28th, is *consistent* with seborrheic dermatitis, a condition which may have its onset at puberty [p. 551]. There is no evidence as to when this slight redness *first* developed before February 28.

In any event, after using the Selsum for at least four months in a manner which she was unable to describe at the trial, plaintiff returned to Dr. Martin on July 6th, 1955, who in turn referred her to a dermatologist, a Dr. Frank M. Melton [p. 324] at Fargo, North Dakota, who saw plaintiff on August 9, 1955.

At this time there was *no inflammation* of the scalp and no scaling of any consequence [p. 331]. There were some small pustules. The hair follicles were examined and found to be atrophic, *i.e.*: a shrinkage of tissue. No doctor suggested that thioglycolate did or could cause such a

condition. The doctor formed no opinion as to the permanency of this condition [p. 332]. By this time plaintiff's hair was in the condition reflected by plaintiff's exhibits A and B [p. 333]. Plaintiff lost her eyebrows, part of her eyelashes and the pubic hair was short, in varied size and there were plaques, that is, areas of almost complete loss of hair [p. 365]. It is conceded that the loss of eyelashes and eyebrows did not occur until the month of June 1955, or over four months after the alleged cold wave. At all times during the administration of the wave solution a towel was kept over plaintiff's forehead and eyes. To her knowledge none of the solution got into her eyes [pp. 231; 235].

Dr. Melton prescribed no allergy tests for plaintiff [p. 344]. He saw her on one subsequent occasion, September 21, 1955. He did, however, prescribe *thyroid* substance for her, which was discontinued by plaintiff's mother because Mrs. Nihill thought it was making plaintiff too thick through the hips [p. 545].

Later the plaintiff was seen in Minneapolis by Dr. Henry E. Michelson, who is regarded as an outstanding dermatologist [p. 610]. As plaintiffs counsel stated, he was "one of the best in the country [p. 125]. After her arrival in Los Angeles, she was examined by Dr. Harry Levitt for the plaintiff and by Dr. Harvey Starr, both dermatologists.

According to plaintiff her condition has remained practically stationary and she has at times used a wig.

The Medical Testimony.

Previously, only the barest facts have been set forth relating to the doctors so that the court would be able logically to follow the continuity of events. The medical

testimony consisted of the following doctors for the plaintiff:

(1) Dr. Clarence S. Martin of Kensal, North Dakota, who originally treated plaintiff on February 28, 1955, and treated her for seborrheic dermatitis. As to whether the plaintiff's condition was permanent, the doctor would only say that "I would feel there is more probability that this will be a permanent loss of hair than it will not be, although, I am in no position to say *definitely one way or the other.*" [p. 314].

On the question of the relationship, if any, between the home permanent, and the plaintiff's condition this doctor had the opinion that "Well, I would, my opinion is that this loss of hair *may well have been due* to the home permanent but certainly, *I do not feel it can be proven for sure, one way or the other.*" He was then asked more specifically, if the application of the cold wave solution *"could"* cause the condition he observed [p. 315]. To this question the doctor replied as follows: "I feel, from the presence of the inflammation in her scalp, and the absence of any evidence of fungus infection * * * that this condition which *I saw on her scalp and in her scalp may well have* been due to a chemical irritant such as you mentioned was in the home permanent" [pp. 315-316].

Dr. Martin was given *no information* in any question about the percentage of thioglycolate supposedly contained in the Cara Nome Cold Wave, and obviously, the patient never gave him such information.

(2) *Dr. Frank M. Melton,* a specialist in dermatology, practicing in Fargo, North Dakota, found that the plaintiff had lost her eyebrows [p. 327]. The hair

of the axilla (armpits) and the pubic hair was *sparse* [p. 327].

The doctor made a diagnosis of alopecia [p. 328]. He was asked, over objection as to whether [p. 336] thioglycolate can or cannot be harmful to the skin or scalp. He stated "It can be harmful in the sense that other allergic reactions can occur in concentrations that are used. Alopecia *may* occur and toxic reactions have been *reported*" [p. 337]. * * * On the toxic reactions there have been *controversial* studies on reports as to their exact nature [p. 337].

The doctor conceded that there was evidence "both for and *against*" the diagnosis of alopecia areata [p. 343]. The condition may involve only a part of the hair or it may extend and involve the whole head [p. 343]. The doctor was unwilling to state with reasonable medical certainty that the plaintiff *did not have alopecia areata* [p. 343], *i.e.,* loss of her hair from *unknown causes* [p. 344].

This doctor eliminated allergy from his consideration solely because there was *no other* symptom of allergy [p. 348] such as erythema or redness. The history was obtained by him from the *patient and her mother* and not Dr. Martin, who it will be recalled who did find the *presence of inflammation in plaintiff's scalp* [p. 315]. Dr. Melton conceded that loss of hair *could accompany an allergic reaction.*

(3) *Dr. Harry Levitt,* a dermatologist from Los Angeles examined [p. 351] the plaintiff for the purpose of testifying at the request of plaintiff's counsel [p. 352]. He had read the deposition of Drs. Martin and Melton [p. 352].

In his opinion plaintiff was suffering from *alopecia areata* [p. 353]. In his words, this "is a loss of hair, usually very sudden, which may be from a very small area to an almost complete loss of hair. Usually it is unattended by any changes except the sudden loss of hair. That is, there is no redness or scaling or itching, the hair just falls out" [pp. 353-354].

On the question of causation, the doctor was asked the following question [pp. 356-357]:

> Q. Doctor, based upon your experience and your education as a doctor; based upon the case history of this girl with which you have become acquainted; based upon the case history as given by the two attending physicians, and based upon your personal observation and examination of this girl, do you have an opinion, based upon reasonable medical certainty as to whether or not the original hair damage was caused by a chemical? Now would you give that opinion please, doctor?" [p. 356].

Over appropriate objection the doctor was permitted by the court to answer and stated: "I believe that a cold wave permanent *could* have caused the *original* loss of hair" [p. 357].

A motion to strike the answer was upon the ground that it was speculative and conjectural, was promptly made and denied [p. 357]. *No particular strength of solution* was mentioned in the question although appropriate objection was also made on this ground [p. 355].

This doctor was asked about the causes of alopecia areata and was of the opinion one of the causes was *tension* or *sudden emotional shock* otherwise the causes are *un-*

known [p. 358]. He felt that the loss of the hair could cause an emotional shock [p. 358]. His notes reflected the history however, that "There's no known tension and the patient stated she had little reaction to the fall of hair" [p. 362]. "I asked her how upset she was when her hair fell out and she said that *it didn't bother her*" [p. 362].

The doctor conceded that alopecia areata may come from many *unknown* causes, without history of shock or mental disturbance [p. 363]. His testimony in part follows:

> "Q. Now isn't it a fact, doctor, that a shock or excitement or nervous tension over a girl playing in a tournament, basketball can cause certain tensions, mental strain, anxiety, which could cause this condition? A. Possible.
>
> Q. *Its one of the causes,* isn't that correct? A. *That's correct*" [p. 364].

Dr. Levitt admitted that from the histories of the other doctors and his examination there *was no indication of any chemical reaction* [p. 370].

Dr. Levitt conceded that in teen-agers faulty action of the sweat glands will cause seborrheic dermatitis [p. 373]. Of importance is the condition of a person's body—his individual chemical makeup; his glands [p. 393]. One of the important glands is the *thyroid.* A classical picture presented by a patient with a thyroid problem in an increase in weight, lethargy, dry skin, dry hair and hair loss [p. 374], all of which the plaintiff had exhibited.

PLAINTIFF'S EXPERT TESTIFIED THAT HE BELIEVED PLAINTIFF WAS SUFFERING FROM ALOPECIA AREATA AND THAT THE CAUSE OF THIS CONDITION IN 25% OF THE CASES IS SUDDEN EMOTIONAL SHOCK [p. 362]. THE CAUSE IN THE REMAINDER OF THE CASES IS UNKNOWN [p. 363]. THE RECORD IS DEVOID OF ANY EVIDENCE OF KNOWN SUDDEN EMOTIONAL SHOCK TO PLAINTIFF.

(4) Dr. Henry E. Michelson of Minneapolis, Minnesota, examined plaintiff on behalf of the defense. He was a dermatologist, specializing in his field since 1918 [p. 611]. This doctor had never seen a case of *complete* loss of hair following a cold wave [p. 614]. He was of the opinion she was suffering from alopecia areata, *i.e.,* loss of hair of unknown cause [p. 619].

(5) Dr. Harvey Starr examined plaintiff in Los Angeles on behalf of the defense. He, likewise, read the depositions of the prior doctors [p. 544]. He was of the opinion that plaintiff was suffering from fragilitis crinium[p. 553]. "The hair is dry and is of uneven length; it's fragile, so that it breaks off. That's why the hair has that short, uneven appearance. There may be a slight amount of scale on the scalp. The skin of the body is generally dry and we do know that there are, with people who have this condition, usually have underlying, an underlying physiological explanation for it" [pp. 553-554].

ARGUMENT OF THE CASE.

I.

The Evidence Was Insufficient as a Matter of Law to Establish Any Actionable Negligence Against the Appellant Manufacturer and the Implied Finding of the Jury in That Regard Cannot Be Supported.

A. Preliminary Observations.

Appellant is familiar with the fundamental rule that ordinarily questions of negligence and proximate cause are questions of fact for the jury, on the other hand it is well settled that a verdict cannot be sustained if the essential facts necessitate conjecture and speculation.

Reese v. Smith, 9 Cal. 2d 324, 328;

Wilbur v. Emergency Hospital Assn., 27 Cal. App. 751;

Chesapeake & Ohio Ry. Co. v. Thomas, 198 F. 2d 783, 788.

When there is a complete *absence* of probative facts to support the conclusion reached, the appellate court will reverse the judgment.

Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 744;

Moore v. Chesapeake & O. R. Co., 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547;

Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564;

Kansas City So. P. Co. v. Jones, 276 U. S. 303, S. Ct. 308, 72 L. Ed. 583.

B. The Concept of Actionable Negligence.

Actionable negligence involves the concept of a duty, and a breach of that duty proximately causing injury or damage to the injured party.

Smith v. Buttner, 90 Cal. 95.

> "These three elements—duty, breach and injury—when brought together constitute actionable negligence and the absence of any one prevents a recovery."
>
> *Means v. So. Calif. Ry. Co.,* 144 Cal. 473.

The modern rule, particularly insofar as it relates to cosmetic manufacturers, is well stated in Prosser on Torts (2d Ed., 1950) at page 503:

> "In the ordinary case the maker may also assume a normal user; and he is not liable where the injury is due to some allergy or other *personal*[6] *idiosyncrasy* of the consumer, found only in an insignificant percentage of the population. But, if the allergy is one common to any substantial number of possible users, the seller may be required at least, to give warning of the danger."

See also *Bennett v. Pilot Products Co.* (Utah, 1951), 235 P. 2d 525, 26 A. L. R. 2d 958 (1 in 1,000); *Briggs v. National Industries* (1949), 92 Cal. App. 2d 542, 207 P. 2d 110 (no showing as to number); *Walstrom Optical Co. v. Miller* (Tex. Civ. App., 1933), 59 Sw. 2d 895; *Barrett v. S. S. Kresge Co.* (1941), 144 Pa. Super.

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[6]Obviously the author draws a distinction between true allergies, as does the medical profession, and other personal reactions of a given individual, non-allergic in nature, but which nevertheless take the user out of the category of a "normal user."

516, 19 A. 2d 502; *Stanton v. Sears, Roebuck & Co.* (1942), 31 Ill. App. 492, 38 N. E. 2d 801. See Barasch, Allergies and the Law (1941), 10 Brook L. Rev. 363; Note, 1950, 49 Mich. L. Rev. 253.

It is well settled that the plaintiff has a two-fold burden:

1. The burden of proof is on the plaintiff to prove that the product was unfit for use on normal human beings, and that such unfitness was the cause of plaintiff's injuries.

2. The burden of proof is upon the plaintiff to show that she is within the category of a normal person insofar as the particular preparation is concerned.

The cases cited, both heretofore, and which are hereafter cited in this brief and in the appendices, amply support these statements.

Plaintiff has utterly failed in both respects.

Although Dr. Martin testified that plaintiff did not have any allergy that he was aware of, he made no allergy test. There was positive evidence that there was no chemical burn to the scalp (plaintiff's Dr. Levitt). There is no evidence that the hair is any more susceptible to the chemicals involved in the preparation than the scalp.

If in fact the plaintiff's condition was caused by the preparation, it must be obvious that it was some unusual and different reaction, whether based on allergy, idiosyncrasy, or peculiar susceptibility.

The rule is perhaps best stated in *Ross v. Porteous, Mitchell and Braun Co.* (Me.), 3 A. 2d 650, where the court stated at page 653:

> "In the case at bar, the cause of plaintiff's skin affliction on the evidence remains a matter of doubt and confusion. It may be that she was allergic to the

> dress shield or one or more of its component parts. . . . It is of course possible that the shields contain harmful and deleterious chemicals or substances, but they were not analyzed and if such be the fact, it has not been here established. We cannot resort to a choice of possibilities. That is guess work and not decision. . . . The plaintiff having failed to sustain the burden of proof . . . must be denied recovery."

Plaintiff produced no *expert* testimony, whatever, medical or otherwise indicating that appellant had failed in *any* respect to comply with the standards of the profession. No evidence was produced to show that batch No. 181 was manufactured any differently than any other batch. The "thio" content was clearly shown to be well within the permissible range of "3% to 10%" and the PH of the solution was normal; there is *no contrary evidence.* There was no evidence that the solution contained any poisonous or harmful substance to *normal users.*

> *Stanton v. Sears, Roebuck Co.*(Ill. App.), 38 N.E. 2d 801.

Plaintiff's mother, after she had consulted a lawyer in June and allegedly retrieved the original bottle [Pltf. Ex. 5], bearing the batch No. 181 from the ashcan [p. 466], went back to the same Rexall Drug Store and purchased another kit which likewise bore the same batch No. 181 [Pltf. Ex. 34, p. 467]. Despite the fact the plaintiff had in her attorney's possession prior to and at the time of trial, a full unused bottle of the pin curl lotion, no effort was made by plaintiff to have its contents analyzed; no request was made to the court for the appointment of a chemist to make an impartial analysis.

The evidence is clear that plaintiff did *not* experience the ordinary type of complaint found in an ex-

tremely small percentage of users, *i.e.,* breakage of the hair at the ends, with *no permanent* damage to the hair or permanent loss of hair.

Probably the best statements of the true rule may be found in the case of *Merrill v. Beaute Vues Corp.,* 235 F. 2d 893, where ammonium thioglycolate was involved. It was claimed that the plaintiff suffered, after the application of the cold wave, from an impairment of her vision due to a permanent injury to the optic nerve.

As the court states:

> "The plaintiff herein did not know that a usually harmless product could cause injury to her optic nerve. Until after the filing of the complaint the defendant had no knowledge of eye injuries to others, and then only two were reported. Under the circumstances, a warning would have been wholly ineffective" [p. 897].

In the same opinion, the court states:

> "The law requires a person to reasonably guard against probabilities—not possibilities . . . We therefore have the question as to whether a manufacturer, who places a product on the market, knowing that some unknown few, not in an identifiable class, which could be effectively warned, may suffer allergic reactions or other isolated injuries not common to the ordinary or normal person, must respond in damages. Although there are authorities to the contrary, we think the prevailing and better rule is that the injured person in such cases cannot prevail" [p. 897].

Appellant takes the position first, that in any event, plaintiff has not shown that her condition was caused by the preparation in question. This is fortified by the tes-

timony of her own physicians, particularly Dr. Levitt, who testified that she was suffering from alopecia areata and that the cause of this condition was known in about 25 per cent of the cases to be due to sudden emotional shock and was unknown in the remainder of the cases. There is not a scintilla of evidence in the record to indicate, what, if any, sudden emotional shock this plaintiff was exposed to. The loss of hair did not start to occur until a week to two weeks after the permanent wave and rather than being a sudden affair, was something that extended out over a period of four to five months. The history already quoted was to the effect that the girl was placid about the entire matter. Obviously, if the permanent wave solution did not cause the loss of plaintiff's hair, the appellant could not be held liable *under any circumstances.*

Even assuming that the loss of the hair might have been due to the permanent wave, it is respectfully submitted that this case falls squarely within the holding of the cited authorities. The evidence is practically uncontradicted that this is the only case of its type that had come to the attention of any of the witnesses, let alone the defendant manufacturer. It is obvious that there is nothing inherently dangerous in thioglycolate, from the evidence, which will produce the condition from which plaintiff now suffers. The only remaining conclusion that can reasonably be drawn from the evidence is that if there is any casual relationship at all between the cold wave and the alleged loss of hair, that it is one of those peculiar reactions in an individual not normally to be expected from the group of millions of women who use preparations of this kind.

Where the consumer has a reaction that is completely unforeseeable, the manufacturer cannot be held liable.

Mutual Life Ins. Co. v. Dodge, 11 F. 2d 486.[7]

II.

The Trial Court Committed Prejudicial Error in Instructing the Jury Over Appellant's Objection on the Doctrine of Res Ipsa Loquitur and in Any Event the Form of the Instruction on This Doctrine Was Prejudicially Erroneous.

Since plaintiff had failed to introduce any evidence to establish any negligence on the part of appellant manufacturer, plaintiff was forced to resort to the application of the doctrine of *res ipsa loquitur.*

Over the objection of appellant [p. 721], the court decided to instruct on the doctrine of *res ipsa loquitur.* The court in applying tte doctrine of *res ipsa loquitur* was clearly in error under either the North Dakota law, or the California law.

In the recent case of *Farmers Home Mutual Ins. Co. v. Grand Forks Imp. Co.,* 55 N. W. 2d 315, the Supreme Court of North Dakota held as a matter of law that the doctrine was inapplicable in an illuminating decision.

Preliminarily it might be pointed out that the court states:

> "Plaintiffs are clearly in error in their theory that the principle of res ipsa loquitur is available to establish *proximate cause.* In proper cases, where proximate cause is established, the doctrine of res ipsa lo-

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[7]A detailed analysis of the law relating to manufacturer's liability in the field of cosmetics is set forth in Appendix "C."

quitur comes into play to establish prima facie proof of negligence. The doctrine has no application to proximate cause and does not dispense with the requirement that the act or omission on which defendant's liability is predicated be established as the proximate cause of the injury complained of."

The North Dakota court recognizes that there are situations where positive, direct proof is lacking, and that,

"If the evidence of circumstances will permit a reasonable inference of the alleged cause of injury and exclude other equally reasonable inferences of other causes, the proof is sufficient to take the case to the jury. 65 C. J. S. (Negligence, sec. 244) 1091, 1092. If on the other hand, plaintiffs' proof is such that it is *equally probable the injury was due to a cause for which defendant was not liable a prima facie case is not established.* Meehan v. Great Northern Ry. Co., 13 N. D. 432, 101 N.W. 183; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305; Heather v. City of Mitchell, 47 S. D. 281, 198 N. W. 353; Sears, Roebuck & Co. v. Scroggins, 140 F. 2d 718; Ingram v. Harris, 244 Ala. 246, 13 So. 2d 48; Law v. Gallegher, 197 A. 479, 9 W. W. Harr. 189 (39 Del.); Southern Grocery Stores v. Greer, 68 Ga. App. 583, 23 S. E. 2d 484; Potter v. Consolidated Coal Co., 276 Ky. 404, 124 S. W. 2d 68; Ingersoll v. Liberty Bank of Buffalo, 278 N. Y. 1, 14 N. E. 2d 828; Buxton v. Hicks, 191 Okla. 573, 131 P. 2d 1015; Simpson v. Hillman, 163 Ore. 357, 97 P. 2d 527, Houston v. Republican Athletic Ass'n, 343 Pa. 218, 22 A. 2d 715; Talley, et al. v. Bass-Jones Lumber Co. (Tex. Civ. App.), 173 S. W. 2d 276; C. D. Kenny Co. v. Dennis, 167 Va. 417, 189 S.E. 164.

* * *

"Taking all of the facts into consideration, that the fire did not start at the pan of gasoline, that the fire was not a typical gasoline vapor fire in that there was no explosion or flash back to the pan and that smoke was coming out of the east wall of the shop within a few seconds after the fire was noticed on the bench, we are satisfied that *it is at least as probable,* if not more probable that the fire was caused by a short circuit or some other unknown cause for which defendant has not been shown responsible than that it was caused by the negligent use of gasoline. Under the rule above stated therefore, plaintiffs have not made out a prima facie case. Accordingly, the verdict of the jury dismissing the action was correct." (Emphasis added.) (Pp. 317-318.)

This is basically the same rule that has been enunciated by the courts throughout the country and in California.

Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 247 P. 2d 344.

In *La Porte v. Huston,* 33 Cal. 2d 167, the court held that the doctrine was inapplicable where:

"There was at least an equal probability that the accident was caused by some fault in the mechanism of the car, for which defendants were not liable as that it resulted from any negligent act or omission of the mechanic. Accordingly it cannot be said that it is more likely than not that the accident was caused by the negligence of the defendants, and hence the case was not a proper one for the application of the doctrine of res ipsa loquitur"(p. 169).

See also:

Redfoot v. J. T. Jenkins Co., 138 Cal. App. 2d 108, 291 P. 2d 134;

Spencer v. Beatty Safway Scaffold Co., 141 Cal. App. 2d 875.

It has been said that the doctrine in any event will not apply where the cause of the injury is left in the realm of conjecture or speculation.

Tedrow v. Des Moines Housing Corp., 87 N. W. 2d 563 (Iowa, 1958);

Rollins v. Avery, 296 S.W. 2d 214 (Ky. App., 1956).

One of the most important facets of the doctrine of *res ipsa loquitur* has always been the element of control. It is the fact of control by the defendent which presumably gives the defendant more information with reference to the cause or possible cause of the accident than the plaintiff.

La Porte v. Huston, 33 Cal. 2d 167, *supra.*

It has been held that the doctrine cannot apply where the plaintiff had a hand in mixing the particular solution involved.

Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P. 2d 26;

Phillips v. Noble, 152 A. C. A. 76, 313 P. 2d 22.

Last but not least is the fundamental requirement that the injury or condition must not have been due to any fault or contribution on the part of the plaintiff.

Danner v. Atkins, 47 Cal. App. 2d 327, 303 P. 2d 724.

In the light of the foregoing principles, it is submitted that the trial court committed *fundamental* error in giving the instruction on *res ipsa loquitur.*

1. There is no evidence of any difficulty or problem arising at the time of the giving of the cold wave, no burn, irritation or immediate inflammation; no breaking of the hair or discoloration of the hair or any of the usual or ordinary aftermaths of either a misapplication of the wave solution or a typical allergy or idiosyncrasy.

2. No loss of hair occurred for at least a week or two following the cold wave, and then only when the hair was combed.

3. No doctor was seen until 23 days after the alleged permanent.

4. The use by plaintiff of selsum, a prescription drug, *known to be capable of producing hair loss,* from February 28, for almost four months, without further medical check, and with absolutely no evidence that the detailed directions of the doctor for its use, were followed by the plaintiff.

5. The fact that the plaintiff's eyebrows and eyelashes came out, not immediately, or at the time the hair started falling out, but around the middle of June [p. 412]. This combined with the sparseness of the pubic hair, was evidence which tended to demonstrate that plaintiff's hair loss was entirely unrelated to the cold wave. The medical testimony of the plaintiff revealed at best only the *possibility* that the cold wave *could have caused the condition.* The testimony of plaintiff's expert, Dr. Levitt, indicated that plaintiff was suffering without question from alopecia areata, and that in 75 per cent of the cases the cause of this condition was unknown, occurring to individuals in all age groups, *from infants to adults.*

6. The fact that the plaintiff admittedly had received a prescription for thyroid and that there was evidence of a possible hypothyroid condition, a systemic condition which in and of itself, along with brittle finger nails, and dry skin, would tend to indicate a systemic problem.

It is submitted that the case falls squarely within the language of the Supreme Court of North Dakota in the case of *Farmers Home Mut. Ins. Co. v. Grand Forks Imp. Co., supra,* where it is pointed out that where it is equally probable that the injury was due to a cause for which the defendant is not liable, a *prima facie* case is not established and the doctrine of *res ipsa loquitur* is inapplicable.

It is difficult for appellant to understand how there can be any balance of probabilities pointing toward the negligence of the defendant manufacturer when the plaintiff's own doctor, Dr. Clarence Martin, testified he did not feel that the loss of hair could be proven for sure *one way or the other* to have been due to the home permanent wave.

It is difficult for appellant to understand how there can be any balance of probabilities pointing to the negligence of the appellant manufacturer when the plaintiff's Dr. Levitt testified that except for emotional tension and shock, which exists in about 25 per cent of the cases of alopecia areata, its causes are unknown.

Even assuming that tension and shock might be a precipitating factor in alopecia areata, is there any balance of probabilities pointing to a minimal loss of hair, a week or ten days after the alleged cold wave, as being the precipitating factor, as opposed to the tension involved in the anticipation of playing in a school basketball tournament?

Appellant cannot understand how there is any balance of probabilities in favor if its negligence in the face of the

uncontradicted testimony concerning the use of selsum, a prescription drug, for a period of over four months, without further medical supervision and under circumstances failing to indicate a strict or any compliance with the doctor's carefully given orders relating to its use.

These and other factors which have been heretofore pointed out, compel the conclusion that the giving of the instruction on *res ipsa loquitur* was prejudicial error. In any event, the form of the instruction was erroneous. The court, in part, in dealing with the subject matter of *res ipsa loquitur,* instructed the jury as follows:

> "It is your duty to consider and make up your verdict from all of the evidence in the case, taking into consideration the rule of evidence that I will now give you. That rule of evidence is known as res ipsa loquitur, that is to say, the thing speaks for itself, and that rule of law is recognized by the Courts as the law *in cases similar to this* . . ." [pp. 771-772]. (Emphasis added.)

The particular vice of this instruction, aside from its inapplicability in the first instance, arises by reason of the use of the sentence, "and that rule of law is recognized by the Courts as the law *in cases similar to this,*" because the suggestion is plainly made to the jury that there are cases which are similar to the one in question. It suggests to the jury that there are or were cases which were similar to the one in question. "Similar" has been defined as follows:

> "Nearly corresponding, having a general likeness, . . . Similar implies an impossibility of being mistaken for each other." (See Webster's New Collegigate Dictionary.)

Obviously, the jury may well have been of the opinion that there were cases which were in the law and which were recognized by the law as unmistakably the same as the case at bar, when the evidence in the case from all of the medical doctors was to the effect that they had never seen a case similar to the plaintiff's, which anyone had even claimed had been caused by the application of thioglycolate or any other chemical preparation contained in the cold wave and where millions of these waves have been given without untoward result.

The effect of the use of this language was to render the instruction highly prejudicial to the rights of this defendant under the circumstances.

It is well settled that instructions which are confusing or misleading or which embody propositions of law on which there was no evidence, are erroneous.

See:

McCarthy v. Pa. R. Co., 156 F. 2d 877.

III.

The Trial Court Committed Prejudicial Error in Instructing the Jury on the Liability of a Manufacturer of a Product Which Is Inherently Dangerous.

The trial court charged the jury as follows:

"You are instructed that the manufacturer of a product that is either inherently dangerous or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose

for which its use is expressly invited by the manufacturer. Failure to fulfill that duty is negligence" [p. 773].

Appellant specifically objected to the giving of this precise instruction. [P. 733]. A proper instruction correctly defining appellant's liability was requested [p. 47].

A manufacturer is only required to exercise *ordinary* care in connection with the manufacture of its product.

See:

Prosser on Torts (2d Ed.), p. 497, and collected cases.

Rather than instruct the jury on the fundamental obligation of a manufacturer, the trial court gave the challenged instruction. Any juror hearing the instruction would necessarily assume that it was the feeling of the court that the product was inherently dangerous. There is not one scintilla of evidence in the record that the Cara Nome home permanent pin curl preparation was inherently dangerous, whether negligently made or otherwise. The chemical ammonium thioglycolate, which is contained in the home permanent wave kit, is customarily used by manufacturers in percentages varying from 3 per cent to 10 per cent, depending upon the purpose for which it is intended. There is not one word of testimony that a solution of 3 per cent or 7 per cent or 10 per cent or 20 per cent, even, would make this particular preparation one which was inherently dangerous in its use. There is no testimony that thioglycolate in *any* particular percentage would cause, or has been known to cause, on any scientific basis, the death or complete loss of hair.

It is fundamental that instructions which are misleading and which assume facts which are not justified by the

evidence, may be prejudicial. The prejudicial effect must be determined from the overall picture of the case.

The jurors came back at one stage of their deliberation and requested that the court read certain testimony. This the court refused to do. The particular testimony related to the preparation in question, and the colloquy was as follows:

> "Mr. Thomas (the Foreman): The juror is under the impression that Mr. Lewis didn't have any formula for this pin curl and I guess he wants it read out of the record just what the testimony was on that. Is that right?
>
> The Court: Well, it can be stipulated, can it not, that there was proof of a formula used by Mr. Lewis?" [pp. 800-801].

Counsel refused to stipulate and thereafter the court refused to permit the reading of the record in this regard, although appropriate request was made and exception duly noted.

The significance of this colloquy is extremely important in the light of the instruction. The jury could well conclude that it was the court's feeling that whatever the formula may have been, that the product was one which was inherently dangerous.

Mr. Lewis testified that he at all times manufactured the pin curl permanent under a formula and that he had not changed or altered that formula since October 22, 1954 [p. 596]. He further testified that the preparations were made pursuant to a licensing agreement under the McDonald patent, whereby Lewis was furnished with the formula, "to be used in this particular solution." He had already testified on a prior occasion as to the components

of the particular solution, which is in evidence as an exhibit, and he testified that as a manufacturer, he was familiar with "the formulas" [p. 653].

In other words, this was not a hit and miss operation whereby some chemist would throw together chemicals in a fashion merely to suit himself, but was based upon a rigid adherence to certain formulas which were given to the manufacturer pursuant to the leasing agreement.

The question asked by the juror indicated some uncertainty in this connection and merely points up the error of the court in giving the instruction on the doctrine of a preparation that was inherently dangerous, when there was no proof in that connection.

Even though the plaintiff may have had as a theory, that the preparation was inherently dangerous, it was incumbent upon the plaintiff to prove that fact. No evidence was introduced by plaintiff or defendant which would indicate or tend to indicate that ammonium thioglycolate was inherently dangerous to human beings.

Particularly in point is the case of *Merrill v. Beaute Vues Corp.,* 235 F. 2d 893, *supra,* where the court points out that one who delivers to another an article which is poisonous or contains ingredients which are intrinsically dangerous to human life or health, is responsible. The court states at page 895:

> "We have examined the record and are of the view that the evidence is *insufficient* to permit recovery under this rule.
>
> There was evidence of injury to plaintiff's optic nerve. The attending physician testified that in his opinion the use of defendant's products *caused* plaintiff's illness and permanent injury to the optic nerve,

resulting in impaired vision. He did not testify that the product was inherently poisonous, dangerous or likely to injure anyone who used it." (Emphasis added.)

Under this state of the case the court could find *no liability*. It is interesting to note that the plaintiff's doctor in the *Merrill* case had expressed the unqualified opinion that the plaintiff's injuries were *caused* by the defendant's product.

In this case, plaintiff's Dr. Martin testified merely that the condition which he observed on the plaintiff's *scalp "may* well have been due to a chemical irritant, such as you mentioned was in the home permanent" [p. 316].

Plaintiff's Dr. Frank Melton, a dermatologist, merely testified that ammonium thioglycolate, as such, "in certain concentrates" can be harmful in the sense that other allergic reactions can occur in concentrations that are used. Alopecia may occur and toxic reactions have been reported" [pp. 336-337].

Again parenthetically, it may be pointed out that no particular percentage of concentration of this preparation was given to Dr. Melton *or any of the witnesses*.

3. Plaintiff's Dr. Harry Levitt, a dermatologist who examined plaintiff in Los Angeles shortly before the trial, and many months after the administration of the cold wave, testified that the cold wave permanent in his opinion "could have" caused the original loss of hair.

4. Dr. C. E. P. Jeffreys, a consulting chemist, testified that cold wave solutions may contain as small amount as 3 per cent of thioglycolate and as high as 10 per cent [p. 590]; that the usual normal range was "of the order of

7%" [p. 591]. This witness made a chemical examination of the particular batch, No. 181, from which the plaintiff claimed the pin curl originated and found that it contained 6.94 per cent thioglycolic acid [p. 591]. The PH factor in connection with this particular solution, batch No. 181, was 9.2 [p. 592]. The witness pointed out that actually the cold wave solution as placed upon the market, is alkaline rather than acid. In other words, although the active ingredient is a salt of thioglycolic acid, the acid, when combined with ammonium in a water solution, will give an alkaline reaction [p. 592]. The witness pointed ont that soaps normally have a PH factor of around 10, or higher, or stronger, alkaline content than the normal cold wave solution. There is nothing in the evidence that would even remotely suggest that the cold wave solution or any of its component parts was inherently dangerous to exterior skin or scalp or hair of human beings, and for the court to have given this instruction in the face of a *total lack of evidence on this subject matter,* was fundamental error, and highly prejudicial to the rights of the appellant.

It is well settled that no instruction should be given which assumes as a matter of fact something which is not conceded or which is not afforded by the evidence.

Howard v. Cinn. Sheetmetal and Roofing Co., 234 F. 2d 732.

IV.

The Trial Court Committed Prejudicial Error When It Permitted the Reading Over Appellant's Objection of the Depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, Where There Was No Foundation Laid to Show a Sufficient Similarity of Conditions.

The plaintiff through her attorney commenced to read the depositions of Mrs. Donald Carlson, a neighbor of the plaintiff, which was taken in Jamestown, North Dakota. Immediately defendant's counsel objected to the in troduction in evidence of this testimony or to a further reading of the deposition [p. 448]. An adjournment was taken and the matter was discussed in chambers. After a rather lengthy discussion, the trial court stated:

> "I am inclined to—Mr. Lanier, plaintiff's attorney, seems to be so very confident of his right here personally, I think it would be a *reversible error* to *let them in,* but if it is improper, Mr. Lanier, I'm—In these matters it is never very wise to rely upon the elemental nature of a question of that sort unless it is important. If you insist on reading it, Mr. Lanier, I will let you read it" [p. 457].

Although the trial court was obviously dubious about the admissibility of this testimony, the importance of the testimony from the standpoint of the trial court was quite plain. The court stated, "I said if I was in error about it, it would be *reversible error,* in permitting it to go in" [p. 458].

After considerable more colloquy, the trial court finally decided that it would not permit the reading of the depositions and the offer was denied.

Shortly thereafter plaintiff rested her cause, but the following morning, plaintiff made a motion to re-open her case for the purpose of offering the depositions of Mrs. Carl Carlson and Mrs. Donald Carlson [p. 475].

Further objections were made to the introduction of these depositions [p. 476]. Basically the objections were upon the ground that there was no proper foundation laid for the introduction in that it was not shown that the kits purchased by the two witnesses were the same type of kits or that they contained the same concentration of chemicals. That the depositions showed that an entirely different type of condition developed in each of these women following the alleged use of the preparation; there was no evidence as to the condition of the hair of the two women [p. 481], *i.e.,* whether it was bleached or tinted hair, or to what extent they had followed or deviated from the instructions, or whether they were suffering from any other condition which might have caused the problem related by them.

After this lengthy argument and objection, the trial court finally stated:

> "Mr. Lanier, I sat here and pondered over the thing. I think it is a little doubtful whether you are entitled to have those in or not. It is your case and you are insisting very strongly, and I would hate to deprive your client of a right that would result in her receiving injustice in this court. *Upon your insistance,* I am going to admit those depositions. That was my original ruling and I was so doubtful about it that I excluded them, and now upon your authorities and upon your insistance, I am permitting them to go in and permitting you to read them" [p. 482].

Thereafter both appellants, and at the close of all of the evidence, again moved that the testimony of both Mrs. Donald Carlson and Mrs. Carl Carlson be stricken [pp. 754-755]. This motion was denied.

The action of the trial court in permitting the reading of these depositions was prejudicially erroneous.[8]

Mrs. Donald Carlson testified that she bought a Cara Nome home permanent set at the Kensal Rexall Drug Stores some time in March of 1955 [p. 527]. She did not describe the type of home permanent kit that she bought. She claimed that after the permanent wave, her hair was strawy and dry and the ends were funny colored, more or less they were lighter on the ends than they were at the scalp. The ends were split and she finally had her hair cut [p. 528]. She noticed nothing unusual about the smell other than it was similar to most permanent solutions [p. 529]. She did not notice any difference in the effect of the solution on her hands as compared to other home permanent wave solutions that she had used. She suggested that it rusted the bobby pins. At the time her deposition was taken she had a *full head of hair* [p. 531].

Mrs. Carl Carlson testified that she also purchased a Cara Nome permanent kit. She noticed that after the wave her bobby pins were rusting and she seemed to have two colors of hair. Some of the hair broke off [p. 535]. She had her hair *cut and had no further problem* [p. 537].

The introduction in evidence, over what was obviously the trial judge's better judgment, was extremely preju-

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[8]It might be pointed out that over objection plaintiff's counsel in his opening statement told the jury that the two Carlson women "lost their hair at approximately the same time" [p. 138]. Neither deponent made any such claim.

dicial to the appellant manufacturer. There was absolutely no evidence foundationwise as to the character or condition of the hair of these two women. There is no evidence as to the systemic condition of either of these women. Although they stated that they had followed the directions meticulously, there is no evidence as to which one of the many types of Cara Nome permanent kits they actually purchased. Neither of them claimed to have any irritation or inflammed scalp afterward; neither claimed to have any type of skin condition or dermatitis or scaling of the scalp or dandruff; the manner in which the hair broke at the ends was completely different from that which was described by the plaintiff. Both women testified that some hair came out when it was combed, but there is nothing to indicate that either one of them had any patchy areas where the hair fell out, or that after a matter of weeks, their hair had not returned to normal. The only treatment given was to cut the hair. At the time of the taking of the depositions, both women had a full head of hair [pp. 531, 537]. There was absolutely *no evidence* in any event, that the wave solution used by the two women was from batch No. 181.

The evidence was uncontradicted that whatever problem developed with reference to the plaintiff's hair, it was entirely different in character and nature from the transient condition described by the Carlsons.

V.

The Damages Awarded by the Jury Were Grossly Excessive in Any Event.

Assuming, *arguendo,* that there is sufficient evidence to support the verdict and judgment on liability, the amount of the award was grossly excessive.

The photographs reveal the plaintiff with a stubble of hair over her entire scalp. There is no evidence of scarring on the surface of the scalp. There was no evidence of a chemical burn that would destroy scalp tissue or the hair follicles.

Dr. Martin testified that he was in no position to say definitely one way or the other whether the plaintiff's loss of hair would be permanent [p. 314].

Dr. Levitt, it will be recalled, made a diagnosis of alopecia areata. He stated that most cases of alopecia areata recover a full growth of hair [p. 391]. There is nothing in his testimony, medically, which would give any reason for the suggestion that this plaintiff will not recover eventually the full growth of her hair.

There was ample defense testimony that the girl was obviously suffering from some systemic condition. Plaintiff's own doctor, Dr. Melton, must have recognized this when he prescribed thyroid for the girl. An underactive thyroid is characterized in part by a dryness of the skin, a loss of hair, and a brittleness of the finger nails. All of these conditions were found in this particular plaintiff. There is every reason to believe that with the passage of

time and the elimination of her systemic problems, she will regain the full growth of her hair.

Appellant suggests that in the face of the paucity of evidence and the uncertain and conflicting character of the testimony, that the award of $48,000 for the plaintiff's condition is grossly excessive and that even if the verdict and judgment should be affirmed, that this court should order a remission of a substantial portion of the award.

VI.

The Court Erred in Denying Appellant's Motion for a Judgment Notwithstanding the Verdict.

It should be apparent from the discussion which has preceded in connection with the previous points that there is not a scintilla of evidence of negligence on the part of the appellant manufacturer. There is no legal basis for the application of *res ipsa loquitur* to this case. Under these circumstances the imposition of liability by a lay jury was obviously based upon sympathy, passion, prejudice, or upon the rankest kind of speculation. For the reasons that have heretofore been pointed out, it is submitted that the trial court committed error and that this court, in accordance with its power, should order the judgment reversed and should grant the appellant's motion for a judgment notwithstanding the verdict.

Conclusion.

It is respectfully submitted that the utter failure to establish any probative facts revealing any negligence on the part of the appellant manufacturer, compels a reversal of this cause. That in any event, the action of the trial court in instructing the jury in the manner heretofore referred to was prejudicially erroneous and when coupled with the erroneous introduction in evidence of the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, was undoubtedly responsible for a grossly excessive verdict which has no evidentiary support, and this court should enter judgment notwithstanding the verdict.

Respectfully submitted,

REED, CALLAWAY, KIRTLAND & PACKARD,

and

HENRY E. KAPPLER,

Attorneys for appellant Arnold L. Lewis, doing business as Studio Cosmetics Company.

APPENDIX "A."

List of Exhibits Offered and Received.

Exhibit Number	Page in record where identified	Page where offered and rejected	Page in record where offered and admitted
1	165		165
2	168		197
3	169		
4	172		173
5	174		
6	179	180	
7	186		203
8 to 25, incl.	190		495-496
26	192		196
27	192		
28	203		204
29	205		206
30	284		285
31	284		285
32	285		286
33	285		286
34	460		467
	DEFENDANT'S EXHIBITS		
A	367		685
B	640		641
C, D, E, F	652		652
G	655		656

APPENDIX "B."

CARA NOME

Natural Curl
BRAND

CARA NOME NATURAL CURL PERMANENTS
are custom made for every type of hair.

REGULAR — for normal hair

DYED OR BLEACHED — for dyed, bleached or damaged hair

GRAY OR WHITE — for silver or white hair

FOR LITTLE GIRLS — especially prepared for little girls' hair

PIN CURL PERMANENT — for softer, more casual waves

CARA NOME NATURAL CURL PERMANENTS are easier, quicker, safer; because they all contain Natural Curl's special conditioner to buffer the waving action, making it faster, yet more gentle. Choose the right kit for the wave you want, and you'll be delighted with soft, natural waves from the very first day!

For a casual, soft, natural-looking wave, use Cara Nome Natural Curl Brand Pin Curl Permanent.

Waves, sets, styles the hair all at once!
Saves time — saves resetting.

As easy as setting your hair in pin curls — so easy you can do it yourself!

Perfect timing control, because pin curl lotion is applied to all the curls at same time.
Soft, manageable curls set in your own hair style as soon as you finish the wave!

Cara Nome Natural Curl Brand Pin Curl Permanent will last for weeks, but if a tighter, longer-lasting wave is what you want, it is recommended that you use a Cara Nome Natural Curl Permanent with curling rods.

If your scalp is sore, irritated or scratched, postpone your wave until this condition is corrected. If your hands are chapped, sore, cut, or especially sensitive, wear rubber gloves while giving the wave.

Keep pin curl lotion tightly capped at all times.

Don't leave pin curl lotion or neutralizer where children or pets may get them. They must not be taken internally.

Wait at least two months between permanents. Trim off ends of old permanent for a softer, prettier wave.

The Bobby Pins supplied in this package are specially treated and should be used only once in giving a pin curl permanent.

Use only new enameled bobby pins or aluminum curl clips if you need more curls.

Pin curl lotion may turn purple when it touches some bobby pins, but neutralizer will correct this.

Don't use any coloring products on your hair for at least a week before or after a permanent wave.

NOTE: If the hair has been bleached, dyed or damaged in any way, it is best to take 2 test curls. In giving the test curl, follow the instructions for a complete wave, using only a small portion of the pin curl lotion for this purpose. (Re-cap pin curl lotion tightly after using.)

If the curls are springy and resilient, proceed with the rest of the hair. If not, it is best to postpone the wave until this condition is corrected.

CARA NOME NATURAL CURL GRAND PIN CURL PERMANENT KIT, complete with Pin Curl Lotion, "Neutralock" Neutralizer, Bobby Pins, Plastic Neckline Curlers and End Papers.
CARA NOME CONCENTRATED SHAMPOO or other good quality shampoo.
A clean quart bottle or jar.
A pitcher or hair spray for rinsing.
Small china or glass dish
Comb, hair net, absorbent cotton, bath towels.
Alarm clock or timer
Trim ends of hair and shape

Shampoo just before your wave. Use a good quality shampoo; rinse well with plain, warm water, and towel dry gently. Start the wave when the hair is just barely damp.

You might like to try setting your hair in this casual, becoming fashion.

Make top pin curls first, dampening the hair very slightly with water.

Notice the direction in which the curls are wound.

Set curls on both sides as shown, turning them down and toward the face.

Set back hair, leaving space for plastic curlers at neckline.

Follow these simple directions...

After shampooing, and while the hair is still slightly damp, set hair in small, tight pin curls (see illustrations 1 to 4). Pin your hair up in the pattern you use for your favorite hair style.

DO NOT APPLY WAVING LOTION YET. If the hair becomes too dry to pin curl, dampen with a little plain water.

For the neckline area, it is best to use the plastic neckline curlers supplied in the kit. Their use will produce a stronger, more lasting curl in this part of the hair which is usually resistant and a little harder to wave. (Illustrations 5, 6 and 7 illustrate how to wind hair on neckline curlers.)

Pour *half* of the pin curl lotion into a clean china or glass dish. Use clean cotton (or an eye dropper) to wet each pincurl and neckline curler with pin curl lotion. Be sure every curl is thoroughly saturated. Use fresh cotton to wipe away any lotion that runs onto the scalp or skin.

NOW START TIMING

Throw away any lotion that is left in the dish. (The half in the bottle will be needed later.)

While you are waiting mix the neutralizer solution by following the instructions printed on the neutralizer envelope as follows: Add contents to one quart LUKEWARM water and mix to dissolve. Prepare solution in a jar or bottle JUST BEFORE USING AND DO NOT COVER OR PLACE CAP ON MIXTURE.

After the first 10 minutes have elapsed, wet all the pin curls and the neckline curlers again, using all of the remaining half of the pin curl *lotion*. Saturate all of the curls several times. Wipe away excess lotion again.

Now partly unwind one of the plastic curlers. Place one hand under it and gently push it up toward the scalp. If the wave pattern looks limp, rewind it; wait 5 minutes and test again using a different curl (never leave waving lotion on the hair for longer than 30 minutes from the start of timing.) When the test curl shows definite wave ridges, neutralize immediately, according to the following directions.

To make pin-curls

1. Part off a small section of hair (not more than an inch square at the scalp). Comb through.

2. Wrap the strand around the index finger. The curl should be small — not any larger than a dime.

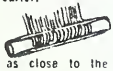
3. Slide the curl off, keeping the ends in the center of the loop. Twist fingertip to tighten curl.

4. Pin flat against the scalp with a bobby pin from this kit. The curl should be a perfect spiral with the tip-ends of hair in the center.

For neckline curlers

5. Part off a section of hair about the width of the curler and one-half inch deep. Comb smooth. Fold end paper over the hair strand and slide it down until ends of hair are all covered.

6. Place a plastic curler under the end paper and wind toward the scalp, turning curler under. Be sure hair is evenly distributed — not bunched on the curler.



7. Fasten as close to the scalp as possible

Wave looks limp, rewind.

Distinct wave ridges. Neutralize immediately.

Fasten a fine mesh net tightly over all the curls and gently rinse or spray with warm water for several minutes. Blot with a dry towel to remove excess moisture. Now pour *half* of the neutralizer solution into a large, clean bowl and with fresh cotton saturate every curl thoroughly with neutralizer solution. Press the neutralizer solution into each curl 3 or 4 times. Throw away the used neutralizer solution.

WAIT 5 MINUTES

Now pour the remaining neutralizing solution through the hair, catch it in a bowl and use fresh cotton to saturate all the curls repeatedly.

WAIT 10 MINUTES

Rinse thoroughly with water and blot with another clean towel. Leave the curlers up under the net until dry. Use a hair dryer if you wish. When completely dry, remove net, pins and curlers; and brush into your favorite hair style.

APPENDIX "C."

Liability of Manufacturer of Cosmetics for Negligence.

1. The effect of a special sensitivity of the consumer on the liability of a manufacturer to that consumer on a theory of negligence.

a. *Prosser on Torts,* 2d Ed. No. 84, p. 503 says: "In the ordinary case the maker may also assume a normal user; and he is not liable where the injury is due to some allergy or other personal idiosyncrasy of the consumer, found only in an insignificant percentage of the population."

Authorities in support are the following:

(a) *Walston Optical Co. v. Miller,* 59 S. W. 2d 895 (Tex. Civ. App., 1933). [2] Where a buyer of eyeglasses sustained injuries caused by dye on the glass frames and the dye was harmless to ordinary persons, injuries being due to some idiosyncrasy of the buyer's skin, the buyer could not recover against the seller of the eyeglasses in an action for negligence.

(b) *Barrett v. S. S. Kresge Co.,* 144 P. Super. 516, 19 A. 2d 502 (1941). [4] Where a dermatitis which a buyer suffered after wearing a dress was due to her individual allergic nature, and the dye in the dress was not harmful to the normal person, the seller of the dress was held not liable to the buyer under the provisions of the Pennsylvania Sales Act (Uniform Sales Act No. 15) relating to *implied warranty* of fitness. In accord with Barrett on almost identical facts is the case of *Stanton v. Sears Roebuck & Co.,* 312 Ill. App. 496, 38 N. E. 2d 801 (1942). The *Stanton* case also held that the *burden of proof* is on

the plaintiff to show that the dyes in the dress were poisonous or contained any harmful ingredient.

(c) *Briggs v. National Industries, Inc.,* 92 Cal. App. 2d 542, 207 P. 2d 110 (1949). P appealed from a judgment n.o.v. granted on motion of D after the jury had returned a verdict for P. P, a customer in a beauty shop, received an application to her hair of D's product "Helene Curtis Cold Wave." Some of the waving solution came in contact with P's forehead, side of her face and right forearm. Three days later she developed a severe dermatitis of the skin around her face, neck, ears and shoulders; and P sued the manufacturer on the theory that it had negligently failed to warn the public or intended users of their product that it contained a chemical toxin known as thioglycolate, and that many persons were susceptible to and might suffer serious damage through its use.

A physician (dermatology specialist) testifying for P stated that thioglycolic acid is a direct irritant if used in concentration over seven or eight per cent. (It was stipulated in this action that the solution used in D's product was 6.28 per cent.) He also testified to the effect that P had a more tender skin than the average person; that she had been vaccinated for smallpox a short time previously to the development of the skin irritation, and that there was a definite possibility that the vaccination could have increased P's sensitivity to the solution used. The appellate court HELD: Judgment for D affirmed. The court says, 92 Cal. App. 2d at page 545: "It was not shown that the solution used on plaintiff *was in fact dangerous* or an irritant to the skin of any person any more

than many cosmetics, face powders, cold cream and nail polish universally used by women. There is nothing in the testimony indicating that many persons were susceptible to the product and might suffer damage through its use. *In fact, from the record, plaintiff's complaint is the only instance in which injury from it was claimed."*

And at page 546: "The general rule is that a manufacturer must give an appropriate warning of any known dangers which the user of his product would not ordinarily discover. One of the essential elements of liability is knowledge on the part of the manufacturer of the dangerous character of the product. There is no substantial evidence that the defendant corporation had any such knowledge. We find no merit in plantiff's contention that the defendant corporation was required to warn the public that great care should be taken in the application of the product."

(d) *Bennett v. Pilot Products Co.,* 235 P. 2d 525, 26 A. L. R. 2d 958 (Utah, 1951).

(e) *Worley v. Proctor & Gamble Mfg.,* 253 S. W. 2d 532 (Mo. App.).

(f) *Bish v. Employers Liab. Assur. Corp.,* 236 A. 2d 62.

2. Basis for denying recovery to hypersensitive or allergic or user with peculiar reaction.

a. That consumer's hypersensitivity was so unforeseeable that the vendor, as a reasonable man, could not anticipate the harmful consequence of selling his product (*Mutual Life Ins. Co. v. Dodge,* 11 F. 2d 486 (1926); *Wheeler v. T. G. & Co.,* 265 Mich. 296, 251 N. W. 408

(1933); *Arnold v. May Dept. Stores Co.,* 85 S. W. 2d 748 (Mo, 1935).)

b. That such hypersensitivity, and not the product, was the proximate cause of the injury (*Hesse v. Travelers Ins. Co.,* 299 Pa. 125, 149 Atl. 96 (1930); *Washstrom Opt. Co. v. Miller, supra,* page 7; *Hamilton v. Harris,* 204 S. W. 450 (Tex. 1918)).

c. That "such cases are so rare" that the allergic person assumes the risk of his predisposition (*Antowill v. Friedman,* 197 App. Div. 230, 188 N. Y. S. 777 (1921)).

d. These reasons all amount to saying that the manufacturer is not liable to the unusually sensitive person either because he has no duty of care to such persons or because the manufacture or distribution of his product is not the proximate cause of the injury because the manufacturer cannot reasonably foresee such injury resulting from the use of his product.

* * * * * * * * *

The courts have firmly refused to hold that a product contains dangerous or deleterious substances if its alleged injurious effect upon the plaintiff was due to (plaintiff's own) idiosyncrasy (*Drake v. Herman,* 261 N. W. 414, 185 N. E. 685 (1933); *Flynn v. Bedel Co. of Mass., supra,* page 3), but have ruled that a preparation is not deleterious to human health in the ordinary acceptation of that term simply because one person in a multitude of those using it happens to meet with ill effects from taking it (*Willson v. Faxoni, Williams & Faxon,* 138 App. Div. 359, 122 N. Y. S. 778 (1910), cited in *Clearly v. Maris, supra* this page).

Some courts have gone so far as to require not merely that defendant had knowledge that some predictable per-

centage of the public would suffer harm from use of the product, but that defendant must have known that the very plaintiff was especially sensitive or possessed of an idiosyncrasy with respect to the product (*Mutual Life Ins. Co. v. Dodge; Arnold v. May Dept. Stores; Wheeler v. T. G. & Co.;* and *Hesse v. Travelers Ins. Co.,* all cited *supra*).

It has even been held that the fact of plaintiff's allergy precludes application of the doctrine of *res ipsa loquitur* (*Runyan v. Goodrum,* 147 Ark. 481, 228 S. W. 397 (1921) see also *Antowill v. Friedman, supra* page 3).

3. Evidence and Burden of Proof.

The final question concerns a two fold problem: (1) Whether the plaintiff has the burden to prove that he is a normal user and not allergic or the defendant has the burden to show that plaintiff is unusually susceptible and that his product is harmless to average users; (2) what evidence will be sufficient to show that defendant knew, or should have known, that his product was dangerous either to the normal user or to some users who may have been allergic?

a. *Zager v. F. W. Woolworth Co.,* 30 Cal. App. 2d 324, 86 P. 2d 389 (1939). This case illustrates the rule that in an action for breach of implied warranty of fitness, the allergy of the user is a defense to the action. Where the seller introduced evidence that other persons had used the freckle cream purchased by plaintiff without harm, and plaintiff introduced no evidence of injury to anyone but herself from use of the cream, the appellate court held that the evidence was sufficient to support the trial court's finding that plaintiff's dermatitis was due to her own allergic reaction to the cream. This, implicitly, seems to

indicate that burden is on plaintiff to prove that the product is dangerous or harmful to normal users.

b. *Graham v. Jordon Marsh Co.,* 319 Mass. 690, 67 N. E. 2d 404 (1946). In action for breach of implied warranty, where plaintiff suffered a dermatitis following use of a cold cream purchased from defendant, the court held (67 N. E. 2d at 405):

> (3) "The burden, however, was upon the plaintiff to prove that the cream was unfit for use by a normal person. She could not prevail by showing that it was merely unfit for use by one who was constitutionally unable to use cold cream because of a supersensitive skin."

c. *Longo v. Touraine Stores, Inc.,* 319 Mass. 727, 66 N. E. 2d 792 (1946). In an action by buyer against seller to recover for dermatitis allegedly caused by wearing of gloves bought from seller, buyer had burden of proving that gloves were unfit to be worn by normal persons, and could not recover by merely showing that they were unfit for her or for some one unusually susceptible. The buyer's evidence was insufficient to sustain burden of proving that gloves were unfit to be worn by a normal person, where there was no showing of any intrinsically unhealthy quality in the gloves that would affect a normal person, but only evidence that buyer was allergic to the gloves.

d. *Karr v. Inecto, Inc.,* 247 N. Y. 360, 160 N. E. 398 (1928). Here a hairdresser at a beauty shop sued the manufacturer of a hair dye for injuries resulting when the dye which she was applying to a customer's scalp came into contact with her fingers. In denying recovery the Court of Appeal of New York laid down the following burden of proof to be sustained by plaintiff, at 160 N. E. 399:

"(1-2) Before the plaintiff may recover she must show, first that the injury to the finger resulted from contact with the chemical product manufactured by the defendant; second, that the chemical product was inherently dangerous and poisonous; and, third, that the defendant was negligent in putting upon the market a dangerous and poisonous product. If the evidence established that the liquid contained in the bottles of dye used by the plaintiff was dangerous and poisonous, then from the fact that the injury followed contact with the dye we might draw the inference that the injury was the result of that contact. In such case, too, we might, without further evidence as to how these particular bottles happened to contain a dangerous and poisonous liquid, infer that such a condition could not have arisen without fault on the part of employees of the defendant. As the foundation of her cause of action, the plaintiff must show by direct or circumstantial evidence at least that the bottles of dye manufactured by the defendant and used by the plaintiff contained a dangerous and poisonous liquid."

* * * * * * * *

"We assume that the injury was due to a chemical irritant or poison. . . . The dye had been applied to the hair and scalp of the customer. It had trickled down her forehead. Apparently it had not injured her, yet without other evidence that the dye contained a chemical poison or irritant we are asked to assume that this so-called 'chemical product' admittedly harmless to the customer, was dangerous and poisonous and caused injury to the plaintiff. Possibly some individuals may possess a peculiar

immunity against the effects of a particular chemical poison or irritant; possibly some other individuals possess a peculiar susceptibility. We know only that, even if the dye used may possibly be a competent producing cause of a morbid condition such as developed on plaintiff's finger, it does not always produce such a result, otherwise the customer would not have escaped injury. All else rests purely on conjecture."

e. *Ross v. Poreous, Mitchell & Braun Co.,* 136 Me. 118, 3 A. 2d 650 (1939). In an action for breach of implied warranty where plaintiff suffered dermatitis of the armpits allegedly caused by dress shields sold to her by defendant, the court held (at p. 653) "that in the sale of wearing apparel, if the article could be worn by any normal person without harm and injury is suffered by the purchaser only because of a supersensitive skin, there is no breach of the implied warranty. . . .

"In the case at bar, the cause of the plaintiff's skin affliction on the evidence remains a matter of doubt and conjecture. It may be that she was allergic to the dress shield or one or more of its component parts. . . . It is, of course, possible that the shields contained harmful and deleterious chemicals or substances, but they were not analyzed, and, if such be the fact, it has not been here established. We cannot resort to a choice of possibilities. That is guesswork and not decision. . . .

"The plaintiff, having failed to sustain the burden of proof . . . must be denied a recovery."

4. Application of doctrine of *res ipsa loquitur.*

a. It is fundamental to an application of the doctrine that if the accident can happen without negligence of the plaintiff the doctrine will not be applied.

b. Thus the doctrine is not applicable where the cause of the injury is, despite the circumstances of the injury, still left in the realm of conjecture or speculation. (*Tedrow v. Des Moines Housing Corp.,* 87 N. W. 2d 463 (Iowa, 1958); *Rollins v. Avery,* 296 S. W. 2d 214 (Ky. App. 1956). Cases such as *Bish v. Employer's Liability Assurance Corp.,* 236 F. 2d 62 (5th Cir. 1956) do not apply to the present case since in those cases the cause was established as the instrument and the only question was negligent manufacturing. Here the very cause of the injury is in doubt, and P's doctors so admit. The best they can do is "give an opinion" that the solution was the cause.

c. In such cases the application of the doctrine is a question of law and the submission of the case to a jury on that theory is error. (*Larkin v. State Farm Mutual Automobile Ins. Co.,* 233 La. 544, 97 So. 2d 389 (1957); *Gephardt v. Rike-Kumler Co.,* 145 N. E. 2d 197 (Ohio App. 1956); *York v. No. Central Gas Co.,* 69 Wyo. 98, 237 P. 2d 845 (1951).)

d. In California the doctrine has been held not to apply where the plaintiff has a hand in mixing the solution. (*Simmons v. Rhodes & Jamieson, Ltd.,* 46 Cal. 2d 190, 293 P. 2d 26 (1956); *Phillips v. Noble,* 152 A. C. A. 76, 313 P. 2d 22 (1957).)

e. In California, the doctrine creates only an inference which may be entirely overcome by evidence which is clear, positive, uncontradicted and of such a nature that it cannot be rationally disbelieved (*Leonard v. Watsonville Community Hospital,* 47 Cal. 2d 509, 305 P. 2d 515 (1956)). Here, Lewis presented the chemists' report that the solution was properly compounded; no contradictory evidence was introduced by P, and since this report was made as a normal business record and the basis and

manner of the tests described it would appear that it is evidence of a type which cannot be disbelieved.

f. Further P must show that the instrumentality which caused the injury remained in the control of D since the doctrine does not apply if the injury may have several causes.

1. Thus P must show that the instrumentality which caused damage was not mishandled or its condition otherwise changed after control was relinquished by the person against whom the doctrine is to be applied. (*Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P. 2d 1041 (1954)).

2. The failure of the Court to so qualify the instruction regarding *res ipsa loquitur* is reversible error. (*Burr v. Sherwin-Williams Co., supra; Zentz v. Coca-Cola Bottling Co.*, 92 Cal. App. 2d 130, 206 P. 2d 652 (1949)).

No. 16282

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,

Appellants,

vs.

SANDRA MAE NIHILL, a minor by her Father and Guardian JOHN NIHILL,

Appellee.

BRIEF OF APPELLANT REXALL DRUG COMPANY, A CORPORATION.

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BRIEF OF APPELLANT REXALL DRUG COMPANY, A CORPORATION.

Statement of Jurisdiction.

The United States District Court for the Southern District of California, Central Division, had jurisdiction over the case because of the diversity of citizenship of the litigants and because the amount in controversy exceeded the sum of $10,000 [R. 3, 4, 6].

U. S. C. A., Sec. 1332.

This Honorable Court has power to review the judgment entered upon the verdict of the jury in the District Court under its Appellate jurisdiction conferred by 28 U. S. C. A. 1291.

Statement of the Case.

On February 5, 1955, the mother of the plaintiff Sandra Mae Nihill bought a pin curl kit under the trade name of Cara Nome from the Kensal Drug Company, the only drugstore at Kensal, North Dakota.

The preparation in question was manufactured, packaged in kits, and labeled with the Rexall-owned trademark "Cara Nome", by the co-defendant Lewis under purchase orders issued from time to time by Rexall Drug Company. The name Rexall Drug Company did not appear anywhere on the packages. Rexall distributed these original packages without any changes or additions to various outlets. The Kensal Drug Company at Kensal, North Dakota, was one of these.

Sandra claims that shortly after the kit had been obtained at the drugstore, her mother, with the help of a neighbor, applied the lotion to Sandra's hair. It is claimed that within a week or two following this application, Sandra's hair began to come out as she would comb it. According to pictures introduced in evidence, the lack of hair, at one time, was nearly total. By the time of the trial, it had partially regrown.

Summary of Pleadings and Proceedings in Trial Court.

Following the above alleged occurrences and the loss of Sandra's hair the present action for damages was brought against the defendants. The amended complaint is in two counts. Plaintiff charged negligence in the manufacture of the preparation against both defendants in one count, and breach of warranty by both defendants in the other [R. 15, 16].

After plaintiff rested, motions were made by defendants independently for a judgment of nonsuit and at the

close of the case both made motions for directed verdict. These motions were also denied.

At the request of the plaintiff, the issues were narrowed and the case was submitted to the jury on the following questions only:

Against Lewis on the sole issue of negligent manufacture alone.

Against Rexall on the sole issue of breach of express warranty [R. 688-689, 690].

A verdict for plaintiff was returned in the sum of $48,000 [R. 79], and judgment was entered thereon [R. 89]. Both defendants moved for a judgment notwithstanding the verdict or in the alternative for a new trial. These motions were denied by the court. Thereupon, both defendants appealed [R. 91-92].

Statement of Issues as to Rexall Drug Company.

The transcript references already alluded to [R. 688-690] have the express and unequivocal effect of limiting the issues to these questions as far as Rexall is concerned: (1) Whether Rexall made an express warranty, (2) whether plaintiff relied thereon, and (3) whether or not there was a breach thereof proximately causing damage to plaintiff.

Since this brief is filed on behalf of Rexall alone, and since it is concerned with the verdict and judgment only in so far as it pertains to the claim of breach of *express warranty,* we shall restrict ourselves to the facts and questions surrounding that issue.

However, the issue of breach of warranty entails all the subsidiary questions which were stated as the points re-

lied upon by Rexall on appeal [R. 809-810]. The basic questions for appeal are the following:

1. Did an express warrant, if made, extend to plaintiff?

2. Was an express warranty proved by competent evidence?

3. Is there evidence that the plaintiff or plaintiff's mother relied on the warranty, if one was actually made?

4. Did the use and application of the hair wave or pin curl solution actually produce the result complained of?

5. Did the trial court err perjudicially in the following rulings on the evidence:

(a) in admitting, over the objections of Rexall, Exhibits 8 through 25 and 28 [R. 190, 483, 495, 203-204];

(b) in not striking, as to the defendant Rexall, the depositions and testimony of Mrs. Carl Carlson [R. 532, 537, 755] and of Mrs. Donald Carlson [R. 448, 470, 526, 531, 755].

6. Did the trial court err in refusing to grant defendant Rexall's motion for a directed verdict [R. 701-702, 715], and the motion for judgment notwithstanding the verdict [R. 86-88, 91]?

Assignment of Errors.

1. The evidence herein is insufficient, as a matter of law, to support the judgment for the plaintiff and against the defendant Rexall Drug Co. for damages [R. 89].

2. The trial court erred in denying the motion of defendant Rexall Drug Co. for a directed verdict on the second count of the complaint [the express warranty count]. Said motion was made on these grounds: (1) that there was no privity of contract between the plaintiff

and Rexall Drug Co.; (2) that plaintiff failed to prove the making of an express warranty by Rexall Drug Co.; and (3) that there was no evidence of reliance upon the alleged guaranty or warranty of Rexall Drug Co. [R. 701-703, 715].

3. The court erred in admitting into evidence [R. 482] and thereafter refusing to strike from the evidence [R. 755] the depositions of Mrs. Carl Carlson and Mrs. Donald Carlson which evidence was in substance that these two persons had purchased Cara Nome permanent wave lotion in March of 1955 at the same drugstore, applied it to their hair, and that it became straw-like and dry and the ends funny colored, that the hair broke off on combing, and that the ends split.

The objection was that no foundation was laid because it was not shown that the deponents either followed or failed to follow the directions [R. 480] and the motion to strike was on the ground that the depositions were immaterial because nothing in them tended to establish a breach of express warranty by Rexall to the plaintiff [R. 754-755].

4. The court erred in admitting into evidence Exhibits 8-25 [R. 495] all of which were ads not only of Rexall products but also of products not carrying the name of Rexall and not even made by Rexall. The ads stated generally that Rexall stands behind its *drug* products, and specifically with respect to Cara Nome that it would give natural curls, or silky softness and that it is faster and safer. We respectfully refer to the exhibits themselves because greater detail with respect to this assignment of error or setting out the ads in an appendix would unduly add to the length of this brief, and a fair impression of them can best be conveyed by a visual inspection of the exhibits.

Objection to their admission was on the ground that no foundation for their admission was laid, that there was no showing that plaintiff had ever seen the particular ads in question prior to the purchase of the Cara Nome solution, and that they do not contain express warranties [R. 483-484].

Summary of the Evidence.

With the questions just stated in mind, we now summarize the evidence.

(a) The Evidence Was Insufficient to Establish Either a Warranty or a Reliance Thereon.

Thomas Henry Stark, Assistant Manager of Insurance and Taxation at Rexall, in response to a subpoena, produced Rexall's advertising records [R. 151]. He was asked to segregate from the mass of materials the material which pertained to Cara Nome pin curl permanent [R. 153]. This was done later, and, as a consequence of the segregation, a number of advertising copy and mats were introduced into evidence marked Exhibits 8 through 25 [R. 483 and 495]. There was also introduced in evidence a pin curl kit and marked Exhibit 1 [R. 165]. That kit contained no guaranty [R. 164] and Lewis maintained that he did not put any guaranty in it. Rexall maintains that under the pre-trial order it was admitted that the product was bought in a sealed container from Lewis and dispensed in a sealed container, so that the claimed guaranty could not have been placed in it by Rexall [R. 165].

Sandra claims that Exhibit 7, which is purportedly a guaranty was "with the boxes of pin curls" right in the Kensal Drug Store [R. 201] and that she took one home with her [R. 203]. Thereupon Exhibit 7 was admitted in evidence [R. 203]. Sandra was also shown an exhibit num-

bered 28. She stated that it was contained in the pincurl kit which was purchased [R. 204].

Mrs. Nihill testified to the same effect, claiming that she saw Exhibit 7 at the Kensal Drug Store [R. 401], that she found it on the counter where the druggist had a pile of them with his display of Cara Nome pin curls, and that she picked it up and gave it to her attorney [R. 402]. She likewise stated that Exhibit 28 was in the Cara Nome kit which she purchased [R. 402].

As to Exhibit 7, there was, then, no evidence concerning its origin or who was responsible for its issuance. No one connected with defendant Rexall was questioned about the document marked Exhibit 7 but it was shown to defendant Lewis, who stated that he was not familiar with it, excepting that "I think I saw this at the Rexall Drug Company at one time" [R. 187]. No identification of Exhibit 28 was made by anyone connected with Rexall.

We take this earliest opportunity to emphasize that Exhibits 7 and 28 are nowhere connected with or traced to Rexall, so that if they could be said to be a warranty, it is nowhere shown that they are a warranty of the defendant Rexall. There is no evidence under what conditions the druggist in Kensal obtained copies of Exhibit 7. With respect to Exhibit 28, the printed matter found in the kit itself, the pre-trial order expressly excludes any assumption that it was placed therein by Rexall, or that Rexall had any responsibility for it, because pursuant to the pre-trial order [R. 28] Rexall received the packaged goods from the manufacturer and did not re-package them but shipped them in the original container to its distributors in the East.

Besides, an examination of these exhibits, as well as of the advertising [Exs. 8-25] which will appear later in

this brief will show, we are confident, that none of these exhibits contain a warranty.

The mother testified that she subscribed to the Farm Journal in her home and that she saw ads of Rexall including Cara Nome pin curls advertised in it. The ads usually said that the Rexall Drug Company stands behind all of its products, or "something like that." She claims she read these ads prior to February 5, 1955, and relied on them* [R. 440-441, 431]. She was the one who bought and paid for the product [R. 436].

This is literally all the evidence that can be found in the record with respect to the alleged warranty of Rexall. It clearly emerges from this summary that there was *no privity of contract* between Rexall and the mother of the plaintiff, to say nothing of the plaintiff herself. They had no direct contractual dealings with Rexall. The contract between the drugstore at Kensal and the Rexall distributor which was introduced in evidence makes it plain that the drugstore in Kensal was not the agent of Rexall for any purpose [R. 640-641, Def. Ex. B].

There was no competent evidence of *reliance*. It is not shown, that the specific advertising admitted as Exhibits 8 through 25 ever came to the attention of the plaintiff, or her mother, or that they read any of the texts represented by these various exhibits. It is the contention of Rexall that the exhibits in question (1) contain no warranty, (2) that they were not relied upon, and that for this reason they were erroneously admitted.

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*There is no evidence that she claims to have relied on any ads not in the Farm Journal. In any event, she could not have relied on several of the ads [Exs. 16, 17, 18, 19] because they were published after February 5, 1955.

(b) The Evidence Was Insufficient to Show Causation.

The evidence with respect to causation, that is, evidence establishing that the application of the cold wave pin curl preparation actually produced the result of which plaintiff complains is likewise insufficient as a matter of law. It is, of course, true that the plaintiffs testified that a partial loss of hair following within a week or two after the application of the pin curl wave lotion, and it is true also that, according to the mother's testimony, the lotion was applied in accordance with the directions contained in the kit. But the mere temporal sequence of two events does not establish legally that the former is the cause of the latter. The evidence of causation was insufficient for at least two general reasons:

In the *first* place, *there was no evidence that the solution was in any way defective* or outside of the tolerances which are ordinarily present in solutions of this type. This matter, we are certain, will be taken up in detail in the brief of the co-defendant Lewis. We shall therefore refrain from elaborating on it at this point. However, we hereby adopt the arguments made by the co-defendant in that respect.

Secondly, none of the experts assigned the application of this particular solution as the cause of the loss of plaintiff's hair. The consensus of opinion of all the doctors was that the loss of hair resulted from an unknown cause.

Three doctors testified on behalf of plaintiff. The first, plaintiff's own town doctor, *Clarence S. Martin,* was a general practitioner. He noticed a slight or mild inflammation and prescribed salsum,* which is a prescription

*There is no consensus of opinion in the record as to the correct spelling.

for seborrheic dermatitis or, in lay terms, dandruff [R. 311]. He felt that plaintiff's condition *could* have been caused by *a* chemical solution containing ammonium thioglycolate, one of the ingredients in all hair wave solutions [R. 315]. He was not asked in what concentrations it would have to be present. Since the evidence is *without dispute* that ammonium thioglycolate in this particular chemical was within normal tolerances as found in all hair wave solutions, the solution, if the physical cause, could not under the law have been the *legal cause* of the loss of the hair.

It is important to note that neither of the two specialists whom plaintiff called made any statement to the effect that in their opinion plaintiff's loss of hair was caused to a reasonable medical certainty by the application of the cold wave solution.

The first of the specialists was *Dr. Melton,* who said that he did not assign a physical reason for the loss of hair in this case [R. 332]. He diagnosed the situation as alopecia, which means loss of hair from causes unknown. On the basis of pathological studies, this doctor stated that the specimens examined are "compatible with alopecia" [R. 328]. He defined alopecia as "loss of hair from causes unknown" [R. 333]. Over objection, this doctor was allowed to answer the question whether ammonium thioglycolate "in certain concentrations"* can or cannot be harmful to the skin or scalp. He answered that it can be harmful in the sense that *other allergic reactions* can occur in concentrations that are used [R. 336-337]. It appears from this doctor's testimony that he is unable or

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*He was not told that the concentration in this particular solution was within customary limits. For this reason his answer cannot have any probative significance.

unwilling to make a diagnosis of the cause of the loss of plaintiff's hair. He states [R. 343] that he is unwilling to make a diagnosis that the plaintiff has or does not have alopecia.

He was asked about the drug selsum which Dr. Martin of Kensal used on the scalp or prescribed for the scalp of the plaintiff and stated that it would not ordinarily be used in case of a chemical injury of the hair or scalp [R. 344]. Other record references [R. 320, 347, 359] show that selsum, if improperly used, *could cause loss of hair,* that it should not be used when there is a burning of the scalp, and that there have been reports of a few cases where selsum caused loss of hair but that there are none authenticated. Selsum is used for the treatment of seborrheic dermatitis [R. 311] and that due to the mild inflammation of the scalp of the plaintiff when first examined by Dr. Martin, he did not feel that he should make a diagnosis of alopecia [R. 322]. He did, however, make a diagnosis of seborrheic dermatitis as already indicated [R. 369].

Neither Dr. Melton nor Dr. Martin made any tests with respect to allergies [R. 318, 344] and the expert Frank M. Melton did not ascertain a physical reason for the loss of hair [R. 332, 337, 343].

On the whole, the North Dakota doctors, both the general practitioner and the expert, did not come to any conclusion on which the jury could find that this particular solution caused the loss of hair. No examination or tests were made to determine whether or not the skin of plaintiff was sensitive to thioglycolate [R. 318].

There was some question as to whether a foreign chemical substance applied to the hair externally could progress down the hair shaft into the hair follicle under the

scalp [R. 338]. The foreign chemical was not specified but Dr. Melton answered "yes". Other doctors stated that this was not possible [R. 330, 372] and still others that only certain oils would have that penetrative action and that the skin would ordinarily not absorb other liquids.

Dr. Harry Levitt, a Los Angeles dermatologist, was called as an expert. He expressed his opinion on the basis of an examination made at the time of the trial and upon the case history and depositions of the other doctors already referred to, including a Dr. Michelson, whose deposition was read on behalf of defendants.

Dr. Levitt came to the conclusion that the plaintiff had alopecia areata which, once more, is the loss of hair, usually very sudden, unattended by any changes of the scalp [R. 353].

Over objection, he was allowed to state whether or not to a reasonable medical certainty the loss of plaintiff's hair could have been caused *"by a chemical"** [R. 354] and he answered "yes". A "chemical could be anything including water [R. 389]. This would not explain the same condition of alopecia areata in Sandra's pubic area, which this expert also found [R. 353, 388]. There is no evidence that Cara Nome was applied to that area [R. 389].

Neither this doctor's testimony nor that of the other experts already referred to is sufficiently definite and specific to tie the loss of plaintiff's hair down to the use of the particular Cara Nome lotion, and we will argue in

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*Emphasis ours. It is significant that, throughout the trial, plaintiff's attorney studiously avoided mentioning the chemical composition of Cara Nome or the percentage of ammonium thioglycolate to his experts. That this testimony has no probative effect is established by such cases as: *Merrill v. Beaute Vues Corp.,* C. C. A. 10, (1956), 235 Fed. 893.

that connection that the objections of the defendants to the questions should have been sustained. It may be noted in this connection that the only known cause, according to Dr. Levitt, for alopecia is emotional tension and that otherwise the causes of this condition are unknown [R. 358]. He stated that according to the history which he received there was no evidence whatever of any chemical burns [R. 369].

If the causes of alopecia are unknown except for emotional tension, one wonders, of course, how the witness is in a position to state, as he attempts to do, to a reasonable medical certainty, that the loss of hair producing alopecia could be caused by "a chemical". One wonders still more when one notes [R. 390, 391] that he believes that emotional tension "will prove to be the only cause of alopecia areata".

He also ascertained from the history that Dr. Melton prescribed thyroid for the plaintiff [R. 373]. When there is a severe lack of thyroid function, he states, there must be a certain amount of loss of hair [R. 374, 380, 545]. But he does not think Sandra had that condition [R. 393].

The witness hinted that the loss of Sandra's hair was due to emotional shock. To him this is only known cause—besides other unknown causes—of alopecia areata.

That theory, however, suffers from the very serious defect that there was no evidence whatever of one of the hypothetical links. Neither the mother nor the doctor in Kensal testified to any emotional shock. The evidence, on the contrary, shows that Sandra was a *placid* and *undemonstrative* child [R. 365] and that she said the loss of the hair didn't bother her [R. 362].

Dr. Harvey E. Starr, specialist in dermatology, was called on behalf of the defendants and testified on the

basis of the testimony of Drs. Melton and Martin, already reviewed, and the deposition of Dr. Michelson and also on the basis of his own physical examination of Sandra [R. 553], that she is or was suffering from a case of *fragilitis crinium.* He gives as the underlying physiological cause a hypothyroid state [R. 554]. He was asked about the diminution in the size of the sebaceous glands which was revealed in a biopsy performed by Dr. Melton and states that in his opinion this diminution in size could not have been caused by the application of an external solution [R. 559-560]. Nor would the application of a normal solution damage the underlying tissue [R. 561]. Although his diagnosis is that of fragilitis crinium, he does not rule out the diagnosis of Dr. Michelson of *alopecia areata* [R. 582]. When he examined the plaintiff Sandra just before the trial, he found no bald areas. However, the thickness or the length of the hair differs in various spots [R. 586].

Dr. C. E. P. Jeffreys testified that he is a PhD with a degree from the Institute of Technology in Pasadena. He is a Doctor of Chemistry. He stated he is familiar with the ingredients of hair waving solutions and that a normal range for thioglycolate in such solutions is anywhere from 3 percent to as high as 10 percent [R. 590]. He made an analysis of Cara Nome pin wave solution from a batch No. 181 (which is the same batch from which the solution used by Sandra was taken) and found that it contained 6.94 thioglycolate acid [R. 591]. He also examined the PH factor of the same solution and found it to be 9.2 which is also within the accepted range for cold wave solutions [R. 592]. He also testified that there is very little absorption through the skin of any material from an aquatic or water solution and that the material most likely to be absorbed is in oil solutions [R. 595].

After it was established [R. 596-597] that the pin curl formula used at the time the making of batch No. 181 has never been changed he was also allowed to testify that he examined Cara Nome solution from batch No. 278 and that it contained 6.9 thioglycolate acid and that the PH factor was 9.02 [R. 599].

He stated that certain thioglycolate salts are used in tanning in certain strengths but that the ammonium thioglycolate salt which is contained in hair waving solution is *not used in tanning* [R. 603].

The final medical expert was *Dr. Henry E. Michelson* whose deposition was read. Both sides spoke in the highest terms of Dr. Michelson as being one of three or four world renowned specialists in dermatology. His examination, more than a year after the original application of the hair wave solution, did show a mild reddening of the entire scalp [R. 613]. According to Dr. Michelson, if hair is to be lost from the application or the reaction to an application of hair wave solution "there would have to be inflammation preceding the loss of hair" [R. 615]. The history given to him mentioned no such reddening [R. 613]. In his own experience he had never had a case where the hair was completely lost following the use of a permanent wave solution, and he was unable to come to any conclusion as to the cause of the loss of Sandra's hair [R. 614]. He read the report from Dr. Melton in which the following history was given:

> "In February of 1955 patient had a home permanent. This was made by Cara Nome. It was for pin curls. Following the permanent there was no erythema
> —A. That is redness.
> Q. "No vesiculas—A. That is blisters.
> Q. "No signs of irritation" [R. 618].

can find no Nevada statute or case law covering the situation, it will look to the California law for the answer.

Since the Federal Court in diversity of citizenship cases will follow this conflict of laws rule established in California, the case here in question must be decided in accordance with California law as it interprets the Uniform Sales Act in force in both North Dakota and in California.

II.

Since the Product Here Involved Was Bought From a Retailer in North Dakota and Not From Rexall Directly, and Since Even the Purchaser Did Not Use It or Apply It to Her Own Person, There Is Not the Requisite Privity of Contract Between Rexall and Sandra Nihill Under Which Alone She Could Recover on the Strength of the Warranty.

We are assuming, but not conceding under this second point, that Rexall was, in fact, the manufacturer and not a middleman. We are also assuming, but not conceding, that the literature which was introduced in evidence does, in fact, constitute a warranty. In later points we shall show that neither of these assumptions are justified by the record.

It is beyond dispute in the record that the druggist in Kensal had no agency relationship to Rexall, that he was strictly a retailer, and that Rexall is strictly a wholesaler.

It is also beyond dispute that neither the plaintiff nor her mother ever entered into any contractual arrangement or relationship with Rexall. The question, therefore, is whether the claimed express warranties inure to the mother's benefit and through the mother to the benefit of the child.

There can be no doubt that *the requirement of privity is practically universal in the American jurisdictions.* Only a small minority of states dispense with it.

Text statements in support of this assertion and references to numerous authorities are collected in 77 C. J. S., Sales, Sec. 305, also in 46 Am. Jur., Sales, Sec. 810.

It is obvious from these text references, that most courts still insist that a warranty is a contractual obligation which does not run with personal property to the ultimate user. In the interest of brevity, we cite no cases. The texts mentioned cite numerous authorities. But we respectfully refer to the significant circumstance that a number of prominent writers have opposed the removal of the privity requirement, especially when ordinary manufactured products are concerned, allowing exceptions only in food cases or inherently dangerous products. See, for instance, Pound, New Paths of Law (1940) pp. 39-40, Williston on Sales, p. 244 (1948 ed.), Leidy, Another New Tort, 38 Mich. L. Rev. pp. 964, 986, Peairs, the Cog in the Machine—a Study in Precedent, 29 Boston Univ. L. Rev. 37, 76-78.

We would not attempt to conceal from this Honorable Court, even if we wanted to, that the views of other writers in the field are to the contrary and that there has been some agitation for abolishing the privity requirement. So far, however, the Supreme Court in California, as *Burr v. Sherwin-Williams Co.,* 42 Cal. 2d 682, 268 P. 2d 1041, demonstrates, has not seen fit to follow in this suggested path.

(a) California, Which Follows the Majority Rule in the United States, Does Not Permit an Ultimate Purchaser or Consumer to Sue the Distributor on an Express Warranty When There Is No Privity of Contract Between Them.

As indicated, the overwhelming majority rule that privity is required for the purpose of enforcing an alleged express warranty was reaffirmed by the California Supreme Court in the recent case of *Burr v. Sherwin-Williams Co.,* 42 Cal. 2d 682, 268 P. 2d 1041. The plaintiffs purchased from an intermediary a product of Sherwin-Williams Co. which was used to dust the plaintiff's cotton crop. The chemical had an adverse effect on the plants. Plaintiff brought an action alleging breach of warranty by Sherwin-Williams. We quote enough from the opinion to show both the contentions of the parties and the ruling of the court:

> "The trial court instructed the jury in the language of subdivisions (1) and (2) of section 1735 of the Civil Code relating to the implied warranties of fitness of purpose and merchantable quality. The jurors were also told that, if there was an implied warranty under this section, there was no requirement of privity of contract between the manufacturer and the ultimate consumer, and the manufacturer would be liable, regardless of negligence, for the damage caused by any breach of this warranty. Sherwin Williams contends that the instructions are erroneous because, it asserts . . . (2) privity of contract is essential to liability for breach of warranty.
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> ". . . The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity be-

tween the original seller and a subsequent purchaser who is in no way a party to the original sale. (See *Lewis v. Terry,* 111 Cal. 39, 44 [43 P. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220]; *Cliff v. California Spray Chemical Co.,* 83 Cal. App. 424, 430 [257 P. 99]; 1 Williston on Sales [rev. ed. 1948] Sec. 244, pp. 645-648; 46 Am. Jur. 489-490; 17 A. L. R. 672, 709; 140 A. L. R. 192, 249-250.) In this state an exception to the requirement of privity has been made in cases involving foodstuffs, where it is held that an implied warranty of fitness for human consumption runs from the manufacturer to the ultimate consumer regardless of privity of contract. (*Klein v. Duchess Sandwich Co., Ltd.,* 14 Cal. 2d 272 [93 P. 2d 799]; *Vaccarezza v. Sanguinetti,* 71 Cal. App. 2d 687, 689 [163 P. 2d 470].) Another possible exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity. (See *Free v. Sluss,* 87 Cal. App. Supp. 933, 936-937 [197 P. 2d 854] [soap package contained printed guarantee of quality]; *Bahlman v. Hudson Motor Car Co.,* 290 Mich. 683 [288 N. W. 309, 312-313] [automobile manufacturer represented top of car to be made of seamless steel]; *Baxter v. Ford Motor Co.,* 168 Wash. 456 [12 P. 2d 409, 15 P. 2d 1118, 88 A. L. R. 521] [automobile manufacturer represented windshield to be nonshatterable glass]; *Simpson v. American Oil Co.,* 217 N. C. 542 [8 S. E. 2d 813, 815-816] [representation on label that insecticide was nonpoisonous to humans]; Prosser on Torts [1941] 688-693; 1 Williston on Sales [rev. ed. 1948]

648-650; Freezer, 'Manufacturer's Liability for Injuries Caused by His Product,' 37 Mich. L. Rev. 1; Jeanblanc, 'Manufacturer's Liability to Persons Other than Their Immediate Vendees,' 24 Va. L. Rev. 134, 146-155.) Neither exception is applicable here. The facts of the present case do not come within the exception relating to foodstuffs, and the other exception, where representations are made by means of labels or advertisements is applicable only to express warranties. As we have seen, the instruction involved here dealt only with implied warranties. Accordingly, it was error for the trial court to instruct that privity was not required" (pp. 692-696).

(b) The Case at Bar Does Not Fall Within One of the Exceptions to the Privity Rule Set Out in the Case of Burr v. Sherwin-Williams Co.

As we have seen, there is one well established exception to the requirement of privity in California, namely the sale of food stuffs. In fact, that exception to the privity rule is widespread in all States which strictly adhere to the requirement of privity in other cases. We need not dwell on this exception because, obviously, the case at bar does not fall into that classification.

Burr v. Sherwin-Williams Co., supra, contains the following dictum:

> "Another *possible* exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity." (Emphasis ours.)

Plaintiff in the case at bar obviously sought to bring herself within this exception. In this connection it is important to notice that the Supreme Court made the statement of this exception by way of dictum and labeled it a "possible" exception. It is, therefore, clear that the question was not expressly decided in *Burr v. Sherwin-Williams.* If the situation were presented to the California Supreme Court on this precise point, it would be free to make its own independent decision at the time. The case which the Supreme Court cites in connection with this "possible" exception, namely, *Free v. Sluss,* 87 Cal. App. 2d Supp. 933, 936-937, 197 P. 2d 854, is a decision of the Appellate Department of the Superior Court in San Diego and is clearly distinguishable from the case at bar.

In that case Mr. James, one of the defendants, came to the plaintiff's retail grocery store and represented that he had a good product in a good looking package, namely, Frederick Margarita Soap. The retailer tried it himself in the home washing machine and found that it wasn't bad. Mr. James then came later and delivered a second batch of this soap which, contrary to the first batch, was found unfit for the purpose for which it was intended. The manufacturer had put on each box or package of soap a guaranty of quality which is set out in the opinion. When he was sued together with the wholesale dealer, he pleaded that there was want of privity. This plea was denied and the Appellate Department of the Superior Court decided without reference to any authorities that privity in the traditional sense was not required because the manufacturer had intentionally and deliberately led another, namely, *the retailer,* to believe that a condition existed which it knew was not the case. The evidence showed without contradiction that the manufacturer had marketed a

product without the necessary ingredients to produce merchantable soap.

Assuming, but not conceding, that warranties of an express nature were made and contained in the exhibits introduced at the time of the trial, the difference between the case at bar and the *Free v. Sluss* case can readily be seen.

(c) The Case of Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N. E. 2d 612 (1958), Is Not the Law of the State of California.

The only case in the State of California which we were able to find involving the application of a permanent cold wave is *Briggs v. National Industries, Inc.,* 92 Cal. App. 2d 542, 207 P. 2d 110. This case was not decided on the question of warranty. It terminated favorably to the defendant because the trial court granted a motion for judgment notwithstanding the verdict, and this judgment was affirmed on appeal. The case will be interesting in connection with the point of causal connection to be made later.

No case in California holds that in the case of a cosmetic product an alleged warranty made to the retailer extends through the retailer to the ultimate consumer.

The temptation to elaborate on the Toni Home Permanent case or to produce arguments pro and contrary as to whether or not the liability for defects in product should be extended by abolishing the rule of privity must be resisted in this connection because it is not germane to the issues before this court. The trial judge was bound to follow the California law, and the California law clearly does not warrant abolishing the privity requirement. On the contrary, in the light of so recent a decision as *Burr v. Sherwin-Williams Co., supra,* the existence of privity

must be shown, and inasmuch as the trial court was not called upon and since it was not its function in this connection to pioneer for the State of California as to what is legal policy and what the law of the State of California should be, we respectfully submit that the California decisions indicating that the privity requirement is in full force in California should have been followed.

We turn now to the following questions (1) Was there, in fact, a warranty? (2) Was there sufficient evidence of reliance? (3) Was there sufficient evidence of causation?

III.

The Evidence Is Insufficient to Show That Rexall Made Any Express Warranties.

Assuming, but not conceding, that privity of contract with the ultimate consumer is not required, it is our next contention that the evidence was insufficient to show that any express warranties were actually made. We submit the following considerations:

(1) The question whether the writing or words claimed to be an express warranty in fact constitute one is a question of law for the court wherever the writing is undisputed or where the undisputed oral evidence definitely establishes the words used. This rule is stated in 46 Am. Jur., Sales, Sec. 321, as follows:

> "If the facts or affirmations relied on to prove an express warranty rest wholly or partly in parol, it has been held that it is ordinarily the province of the jury to determine whether they amount to an express warranty. There is, however, much authority to the effect that the court must determine whether an affirmation contained in an agreement in writing

amounts to a warranty or not, and the same has been held true as regards an undisputed and unequivocal oral affirmation."

The same rule is announced in *Hercules Powder Co. v. Rich* (C. C. A. 8th Cir.) 3 F. 2d 12, where the court stated on page 14 that it would be the duty of the court to declare that certain undisputed statements relied on were not warranties if this appeared as a matter of law. We submit that in the case at bar the words used in the exhibits are, as a matter of law, not susceptible to the construction that they constitute warranties. When the various exhibits introduced in evidence and of which it was said that they contained warranties are analyzed, we find the following picture:

(a) The original package was introduced in evidence and there was no warranty on the package whatsoever. *Not even the name of Rexall appeard on it.* The package merely bore the trade name "Cara Nome" and was asked for by plaintiff's mother at the time of the purchase under its trade name.

(b) It was stipulated at the time of pre-trial that Rexall obtained the merchandise in the original package from the manufacturer. Therefore, anything that was claimed to be inside the package when it was delivered to Rexall for distribution would not be a warranty on the part of Rexall. This would eliminate exhibit 28 from consideration, even if its language could be considered to be in the nature of an express warranty.

(c) Exhibit 7 is claimed to constitute a guaranty and, in part, reads as follows:

"Double your money back if you do not agree Cara Nome Natural Curl is the best home perman-

nent. . . . If you don't agree that Cara Nome Natural Curl is better than any other home permanent, simply mail the unused portion and container, together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Department F, 8480 Beverly Boulevard, Los Angeles 54, California, and they will give you twice the original purchase price in return."

The wording of this document being undisputed, it is a question of law whether it contains a warranty of quality. It is obvious, we submit, that it is in the nature of a "puffing of wares" which is a far cry from a warranty. It merely invites comparison with other similar products and claims that it is the best.

(d) Exhibits 8-25 are in the nature of advertising. It will be noted (i) that some of them bear a date subsequent to the purchase of the pin curl kit and therefore must be automatically eliminated from consideration; (ii) that none of them was shown to have actually been seen either by the mother or by Sandra, (iii) that none of them asserts or represents that Cara Nome is a Rexall drug product. For instance, Exhibit 8, typical of all the others, names a series of products in the nature of *drugs* which expressly bear the name "Rexall". In addition, but in a separate "box", the ad refers to such articles as Cara-Nome Pin Curl Lotion without designating it as a Rexall product. In these separate boxes in the various exhibits it is made clear that Rexall sells many products under labels other than its own, such as "Stag" products, products under the trade name of Ann Delafield, Lord Baltimore Pens, Klenzo Hair Brushes, Helen Cornell Nylon Hair Nets, Adrienne Powder Puffs, Cascade Pens and Pencils, Dura Flash Bulbs, etc. The promise of satisfaction is

extended only to *Rexall Drug products,* and even that language is in the nature of "puffing" and not in the nature of a representation of issuable fact. As to the pin curl lotion itself, nothing more is said than that its use assures natural looking curls or that it produces silky softness or that it produces more natural curls. None of these statements, we submit, go beyond "puffing". We respectfully suggest that that should be declared, as a matter of law, not to constitute warranties.

(2) In California it is, of course, well settled that puffing of wares does not constitute a warranty, either express of implied.

See:

Williams v. Loenthal, 124 Cal. App. 179, 12 P. 2d 75;

Alexander v. Stone, 29 Cal. App. 488, 156 Pac. 998;

Krasilnikoff v. Dundon, 8 Cal. App. 406, 97 Pac. 172.

There are numerous examples in the decided cases which show that expressions of opinion and sales talk do not constitute warranties. Thus, it is held continuously that a mere statement as to quality, even though extravagant, is in the nature of puffing and not a warranty. (*Michilene Tire Co. v. Schultz,* 145 Atl. 67, 295 Pa. St. 140.) Thus, a statement that a coat will wear very well or that a suit will wear like iron have been held to be puffing rather than warranties. See *Keenan v. Cherry,* 131 Atl. 309, 47 R. I. 125, and *Harberger v. Stern,* 189 N. Y. Supp. 74. A statement to a customer that she couldn't find a better vehicle and that it was perfect was not construed as a warranty in *Adams v. Peter Tramonitin Motor Sales, Inc.,* 42 N. J. Super. 313, 126 A. 2d 358.

IV.

The Evidence Shows That Neither the Plaintiff nor Her Mother Relied on the Alleged Warranties Which Were Made.

Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N. E. 2d 612, which dispensed with privity, was disposed of on the pleadings. It recognizes, however, the necessity of showing reliance.

Under this heading we shall endeavor to show that there was not sufficient evidence to establish that the palintiff or her mother purchased the article in reliance on the advertising introduced into the record.

The requirement of reliance is universal. It is well established in California. See, for instance,

Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal. App. 2d 520, 125 P. 2d 113;

Burr v. Sherwin-Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041;

Pedroli v. Russell, 157 Cal. App. 2d 281, 320 P. 2d 873.

It matters not, therefore, how many representations or warranties are made. They are of no consequence if the buyer does not actually rely upon them.

We are, therefore, required to examine the record to see if there is any competent evidence of reliance.

The fact is that Sandra had merely heard of a Cara Nome lotion and that the mother had read in the Farm Journal some advertisement concerning that lotion. All she could remember about that advertisement is that it said in effect that Rexall stands behind its products [R. 401]. We have seen that her memory is not correct. The "guarantee" refers to its *drug* products.

She did testify that she read Rexall ads and that she relied on them, and that is the reason why she went into the Rexall drugstore to buy a Cara Nome kit [R. 401]. We invite the court's special attention to that page. It does not show anywhere that she was shown or identified the Exhibits 8-25 as the ones which she had seen. Plaintiff's own counsel states that she has never seen or read the exhibits in question. There is merely an assertion by co-counsel that what she read is identical with the exhibits [R. 494-495]. It is on the basis of this tenuous statement that the trial judge remarked,

> "Well, I'll let them in. It's your case, Mr. Lanier. *If you get me in trouble here, why it's your poor little gal that's going to suffer from it*" (emphasis ours) [R. 495].

It cannot be said that the purchase was made on the basis of either Exhibit 28 which is claimed to have been in the box [R. 401]. The only testimony with respect to the guarantee [Ex. 7] is that she picked one up and took it home with her [R. 402] and with respect to Exhibit 28, that it was found in the Cara Nome kit [R. 402].

There is testimony that she took both the guarantee and Exhibit 28 and pinned them up on the wall in her home, but even if she read Exhibit 28, it was after the purchase and therefore not literature in reliance on which she purchased the merchandise. Therefore, not only was the literature in question not a warranty but, whatever its language, it was not the factor which induced the mother to purchase the article.

This leaves us with a consideration of her statement that she read an advertisement in the "Farm Journal". *Significantly enough, as we saw, none of the 18 pieces of*

advertising which were introduced as Exhibits 8 to 25 were submitted to the plaintiff or to her mother and she was not asked with respect to a single one of them as to whether this was an ad upon which she allegedly relied. An examination of these ads will show that several of them appeared after February 5, 1955.

The law is that a newspaper ad which appeared after the purchase does not furnish a basis for recovery.

Degouveia v. H. D. Lee Mercantile Co. (Mo. App.), 100 S. W. 2d 336;

Evans v. Sears (Ga.), 176 S. E. 843.

Proof of reliance *on a Rexall product* is, therefore, completely lacking.

V.

The Evidence Was Insufficient to Show That the Product Purchased Had Any Defect in It or Was the Cause of Sandra's Loss of Hair.

As we pointed out earlier, Sandra and her mother claimed they applied the hair lotion in accordance with directions and that approximately a week or two afterwards, Sandra began to experience a *gradual* loss of hair. Actually the evidence is quite conflicting as to whether the directions were followed. There is not one iota of proof that this preparation contained a defect and that such defect caused the result of which Sandra complains.

(a) There Was No Evidence That the Cara Nome Solution Contained Any Deleterious Concentrations.

All the evidence shows is that the solution contained thioglycolate. But there is niether direct nor indirect evidence from which it may be inferred that thioglycolate is a deleterious and inherently dangerous substance. It may,

of course, not be palatable, it may have a strong odor, it may cause metal hair pins to rust,* and it may even cause internal damage when swallowed. But no representation was made that it could be taken internally and it was not, in fact, taken internally. There was not even an attempt to show that the application of a concentration of 6.93 percent thioglycolate or any other concentration upon the skin of any *ordinary human* will produce any results of an adverse nature whatsoever. It was further shown that the concentration of thioglycolate in the wave lotion was within standard and accepted tolerances. Plaintiff did not see fit to produce any expert or manufacturer, or any other evidence whatever to show that a 6.93 percent concentration is not within normal tolerances for human hair and for the human scalp.

Plaintiff was not in any way hampered in making a showing which would have established a harmful ingredient or a harmful concentration in this preparation, if such had been there in fact. Plaintiff introduced in evidence a kit of batch No. 181 which was unopened and not analyzed by plaintiff although obviously there was ample opportunity to do so, if it was believed that the chemical analysis of the defendants was in error. The manufacturer by his methods of control kept samples of the very batch in question for future analysis and such analysis was made at the request of the plaintiff. He also kept batch records and records of analyses of the very batch from which the solution in question was drawn. These also showed that the merchandise was within accepted tolerances. In short, plaintiff was as far from proving any-

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*Many of us have had the experience of fishing rusted bobby pins out of a swimming pool, or seeing the rust form on an iron skillet, for simple illustrations.

thing harmful or deleterious or outside the range of normal hair wave solution tolerance as was the plaintiff in *Briggs v. National Industries, Inc.,* 92 Cal. App. 2d 542, 207 P. 2d 110.

In that case plaintiff's hair was treated with a Helen Curtis cream oil cold wave. Three days after this occurrence plaintiff had a severe dermatitis or inflamation of the skin, involving her face, neck, ears and shoulders with spots beginning on other parts of her body. It was admitted in that case that the cold wave solution used contained thioglycolate which has the effect of softening the hair so that it can be shaped. In that case there was even a physician testifying on behalf of the plaintiff, but he testified that the substance is an irritant only if it is used in concentrations of over 7 percent or 8 percent. The solution in that case was approximately 6.28 percent according to tests. Since this was in the normal range of tolerance, a suggestion or inference that there was a "partially allergic background" was almost inevitable, but whether there was an allergy or not, the court felt that inasmuch as a solution was used which did not exceed the limits of normal tolerance, a judgment in favor of the plaintiff could not have been sustained. The court said:

> "It was not shown that the solution used on plaintiff was in fact dangerous or an irritant to the skin of any person any more than many cosmetics, face powders, cold cream and nail polish universally used by women. There is nothing in the testimony which indicates that many persons were susceptible to the product and might suffer damage through its use. In fact, from the record, plaintiff's complaint is the only instance in which injury from it was claimed."

It is true that in the case at bar there were approximately eight claimed injuries in a year out of all of the various types sold but there is no indication as to whether they were meritorious or not and they arose out of the sale of approximately 450,000 units.

(b) There Was No Evidence That the Cara Nome Preparation Caused the Loss of Sandra's Hair.

As to the second requirement, namely, that the substance used must have caused the injury, the record is equally barren of proof. Since the question with respect to Rexall is that of an express warranty and the consequences of its breach, no negligence is involved. In the case at bar there would have to be proof that the *natural* or *physical cause* of the injury is the solution itself. There is not sufficient evidence in this case from which the jury could have concluded that such was the case.

Certainly, neither the plaintiff nor her mother gave any testimony on the basis of which it could be established that the physical cause of the falling out of the hair or its destruction was the application of the lotion. There was no initial inflammation* and there was no irritation following the application of the solution. All that can be said from the testimony of Sandra and of her mother is that the loss of the hair began in temporal sequence with the approximate space of one week *or more* intervening between the application and the first signs of the loss of hair, but neither scientifically nor legally does it follow because two events occur in temporal sequence the event first in time is the physiological, biological or chemical cause of the later event.

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*Although at the time of Dr. Martin's original examination he found a mild inflammation, this was *23* days after the alleged permanent and was perfectly consistent with the usual finding in sebarrheic dematitis, which is unrelated to a cold wave reaction.

The testimony of the experts in this respect is equally inconclusive. Dr. Michelson, Dr. Jeffrey, and Dr. Starr stated that they deemed it extremely unlikely that the physical cause of plaintiff's loss of hair was the solution applied. The other doctors went as far as to say that while they did not know the cause of the loss of hair, it could be caused by an application of "a chemical". It is plain, therefore, that the record is entirely insufficient, as a matter of law, to show that the physical cause of the loss of hair was the wave solution that had been applied.

A very recent authority supports what has just been stated. In the first one, *Sheptur v. Proctor & Gamble Distributing Co.* (C. C. A. 6, 1958), 261 F. 2d 221, 223-4, the trial court directed a verdict for the defendant at the close of plaintiff's testimony, as we contend, should have been done in the case at bar [R. 755]. Plaintiff testified that her work required her to immerse her hands in dishwater for eight hours a day six days a week. A product known as Tide was furnished and used. At other times a product called Surf was employed. Plaintiff developed a severe skin irritation. She was treated and left her employment and was treated for several weeks. When she returned a different soap was used for several days, but then her employer reverted to Tide. She used Tide this time "just one day" and "quit right there." The doctor did not testify that Tide caused the irritation. Plaintiff said it was nothing else but Tide. Her expert medical witness who had never treated her, said that it "could have been caused by Tide if that was the product that was used in her dishwashing." The Circuit Court said:

> "We think the judgment of the District Court must be affirmed. A doctor's testimony to the effect

that an alleged injury 'could have been caused' in the manner claimed has little probative value. Cole v. Simpson, 299 Mich. 589, 595, 1 N. W. 2d 2. Moreover, while lay witnesses such as plaintiff may testify as to what they observe and know, their testimony with reference to scientific facts requiring knowledge beyond that of the ordinary nonprofessional person has little evidential effect. New York Life Insurance Company v. Newman, 311 Mich. 368, 375, 18 N. W. 2d 859. One does not have to be an expert as to what one sees and knows in order to give probative testimony. De Groot v. Winter, 265 Mich. 274, 251 N. W. 425; Austin v. Howard A. Davidson, Inc., 246 Mich. 599, 225 N. W. 524. Here, however, the question of the cause of the dermatitis involved scientific and medical facts beyond the knowledge or experience of plaintiff. New York Life Insurance Company v. Newman, supra. The instant case presented aspects upon which the testimony of an ordinary layman as to cause of the injury could shed little light. The fact that plaintiff was compelled to immerse her hands in heated water for eight hours a day six days a week was not to be ignored. Whether the water in which she had to immerse her hands so continuously was hard or soft, and whether it contained chemicals such as chlorine does not appear, although doubtless these facts would have had bearing. A complex scientific problem was presented as to whether the dermatitis might not have been caused by the particular water and its use for such a continuous time. The fact that plaintiff was supplied with Surf for a substantial period before quitting the restaurant also was important.

"It is to be observed that the court did not exclude this evidence. It was for the court to decide whether the evidence had sufficient probative force to present a jury question. The District Court rightly ruled, in view of plaintiff's lack of training or experience, that her evidence was not sufficient to require submission of the case to the jury.

"The testimony of plaintiff's expert witness also fails to develop a prima facie case. He did not say that Tide was a more probable cause of the dermatitis than Surf or the other soaps and detergents admitted to have been used by plaintiff, nor that Tide was a more probable cause than the use of the heated water under the circumstances.

"The rule upon this subject under Michigan law, which is controlling here, is thus stated in Kaminski v. Grand Trunk Western Railroad Company, 347 Mich. 417, at page 421, 79 N. W. 2d 899, at page 901:

" 'It is thus right to say that the trial judge's immediate duty, motion for direction having been made with address to the rule of conjectural choice between equally plausible inferences, is to determine or favorable view of the inference plaintiff relies upon whether it stands equi-ponderant at best with such as is, or are, urged by the defendant. If the answer is affirmative, then and only then will the judge be justified in proceeding as moved.

"Some 30 years ago the supreme court of Alabama adopted a workable test-definition designed toward ascertainment of what is conjectural and what is not in negligence cases. That court recently referred to such definition as having "been quoted until it has be-

come a classic", City of Bessemer v. Clowdus, 261 Ala. 388, [394], 74 So. 2d 259, 263. We quote it as follows from the Bessemer case:

' "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." '

"The scintilla rule does not obtain in Michigan. Under Michigan law, in order to make a prima facie case that requires submission to the jury, plaintiff's evidence must justify inferences that its contentions are at least equally as probable as those relied upon by defendant. Kaminski v. Grand Trunk Western Railroad Company, supra; General Motors Corporation v. Wolverine Insurance Company, 6 Cir., 255 F. 2d 8. The happening of an accident is not of itself any evidence of negligence. Daigneau v. Young, 349 Mich. 632, 85 N. W. 2d 88. Here there were to or three equally probable causes to account for plaintiff's condition. The probative evidence is not selective to any one of the possible causes. Cf. Kaminski v. Grand Trunk Western Railroad Company supra. The jury is not warranted in speculating under this record that Tide was the proximate cause of the in-

jury. Frye v. City of Detroit, 256 Mich. 466, 469, 239 N. W. 886. This case declares that the proof in such instances 'must show more than a possibility.'

"All questions presented have been considered. We find no reversible error in the ruling of the District Court."

(c) The Alleged Result of the Application of the Lotion Was Not Foreseeable.

The rule of foreseeability and remote consequences is ordinarily applied in connection with the question of negligence. Undoubtedly, it will be discussed at some length in the brief of co-defendant Lewis. But the rule also has its place in the law of warranties. In other words, *a warranty is not breached if the use of the product has unforeseen, unusual results that occur only rarely.*

In this case the evidence was that out of 450,000 kits an average of 8 complaints of various nature came to the attention of the claims manager of Rexall [R. 642]. In view of this figure the product cannot be inherently harmful, dangerous or defective. In so unusual a situation the reasoning of the court in *Merrill v. Beaute Vues Corporation* (C. C. A. 10, 1956) 235 F. 2d 893, is applicable. The plaintiff in that case used a hair waving product of defendant (containing thioglycoate) and suffered hives, nausea, and blurred vision. This was an unusual and generally unforseeable result. As in the case at bar, no allergy on the part of the plaintiff was proved. The court, referring with approval to the case of *Briggs v. National Industries,* 92 Cal. App. 2d 542, 207 P. 2d 110, said:

"Although there was no direct evidence tending to show that the plaintiff was allergic to defendants' product or that her injury constituted an isolated injury to an unusually susceptible individual, the undis-

puted evidence is that with the exception of two cases referred to in the Robson-Cameron article, the injury to plaintiff's optic nerve is the only one reported out of five hundred million users of the product. This in itself is sufficient to sustain the court's finding on this subject. We are satisfied that considering all the facts and circumstances the issue was raised and the findings necessary. We therefore have the question as to whether a manufacturer who places a product on the market, knowing that some unknown few, not in an identifiable class which could be effectively warned, may suffer allergic reactions or other isolated injuries not common to the ordinary or normal person, must respond in damages. Although there is authority to the contrary, we think the prevailing and better rule is that the injured persons in such cases cannot prevail. The reason generally given for the rule is that the injury is caused by allergy or the unusual susceptibility of the person and not the product. The essence of these decisions is that a reasonable person could not foresee the purchaser's condition and could not anticipate the harmful consequences. In the case at bar, as in similar cases, the plaintiff herself did not know that a usually harmless product could cause injury to her optic nerve. Until after the filing of the complaint, the defendants had no knowledge of like injuries to others, and then only two were reported. Under the circumstances, a warning would have been wholly ineffective. Bennett v. Pilot Products Co., 120 Utah 474, 235 P. 2d 525, 26 A. L. R 2d 958, and Briggs v. National Industries, 92 Cal. App. 2d 542, 207 P. 2d 110, are cases dealing with cold wave products containing ammonium thioglycolate. In each case the plaintiff suf-

fered reactions, other than optic neuritis, from coming into contact with the product, and in each case it was held that there was no liability on the part of the manufacturer. The Utah court, in referring to the cases relied upon by plaintiff, said:

" 'So far as they sanction recovery by an unanticipated few whose sensitivities or allergies are not reasonably foreseeable, we cannot accept them. Rather we must adhere to the philosophy enunciated by the cases reflected in respondent's citations and which was put so aptly by Dean Prosser in his work on Torts, p. 679, to the effect that: "The manufacturer is at least entitled to assume that the chattel will be put to a normal use by a normal user, and is not subject to liability where it would ordinarily be safe, but injury results from some unusual use or some personal idiosyncracy of the consumer." Citing Walstrom Optical Co. v. Miller, Tex. Civ. App., 1933, 59 S. F. 2d 895.'

"Cases on the subject are collected in an annotattion in 121 A. L. R. 464, and 26 A. L. R. 2d 963.

"Neither do we think that the defendants are liable to plaintiff on an implied or express warranty. Warranties do not extend to injuries caused by peculiar idiosyncrasies or physical condition of a user which are not reasonably foreseeable. The rule as to negligence in such cases applies to warranties. Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S. W. 2d 532; Barrett v S. S. Kresge Co, 144 Pa. Super. 516, 19 A. 2d 502; Stanton v. Sears Roebuck & Co., 312 Ill. App 496, 38 N. E. 2d 801; Zager v. F. W Woolworth Co., 30 Cal. App 2d 324, 86 P. 2d 389; and cases collected in 26 A. L. R. 2d 966."

VI.

The Trial Court Erred Prejudicially in Its Admission of Evidence (a) in Admitting the Deposition of Two Witnesses Claiming That They Had Had Adverse Results From the Application of Cara Nome, (b) in Admitting Into Evidence Exhibits 8 to 25 Containing Advertising Matter Without Foundation.

(a) It Was Error to Admit Into Evidence the Depositions of the Two Witnesses by the Name of Carlson.

Mrs. Donald Carlson testified [R. 526] that she purchased a Cara Nome permanent wave in March of 1955 in the same drugstore, that after application it made her hair strawlike and dry and the ends funny-colored, that it broke off on combing it, and that the ends were split. To her the lotion had no other smell than most permanents have [R. 529]. She testified that she felt a slight burning sensation on her hand but not any different from any other home wave solutions [R. 530]. The effect on her hair, however, whatever it might have been, was not permanent because she regained a full head of hair [R. 531]. The other Mrs. Carlson also referred to the strawlike and breaking of her hair after the permanent [R. 535]. She likewise had her hair cut and she likewise had a full growth of hair again.

We submit that the admission of this evidence was clearly erroneous. There is no evidence that the same batch was involved, there is no evidence that it was applied under the same conditions, there is no evidence that the results were similar or the same. Even if the requisite foundation had otherwise been laid, it would not be ad-

missible against Rexall in an action on a warranty because the only thing material in a warranty action would have been the result which the wave had when it was applied to the plaintiff.

(b) The Trial Court Erred in Admitting Exhibits 8 to 25 Without Any Evidence Whatever That the Advertising Matter Was Seen or Relied Upon by the Plaintiff's Mother.

At an earlier point we recited in detail the evidence with respect to the advertising matter admitted into evidence. The discussion in the record concerning its admissibility and the objection thereto appears on pages 494-495. The court itself stated that the *only* evidence that anybody read the ads in connection with this case was Mrs. Nihill reading the Farm Journal (p. 494). However, as we pointed out earlier, there is no evidence that she read any one of the ads offered. The attorney for the plaintiff was of a different opinion as to the state of the record, his recollection being that the mother had read the ads many times and particularly one magazine, namely, the Farm Journal. This assertion the record does not substantiate. Nevertheless, the court permitted the introduction of them with this comment: "It is your case, Mr. Lanier. If you get me in trouble here, why it's your little gal that is going to suffer from it" [R. 495].

VII.

The Trial Court Erred in Not Granting the Motion of Defendant Rexall for a Directed Verdict.

A directed verdict which defendant Rexall asked for [R. 475] should have been granted. From the cases cited in the earlier points it appears:

(1) There was no evidence of an express warranty;

(2) There was no evidence that plaintiff or her mother saw or relied on any alleged warranty;

(3) There was no evidence that the pin curl solution was the cause of Sandra's loss of hair;

(4) There was no privity between the defendant Rexall and the plaintiff or her mother.

We have shown that the record is insufficient as a matter of law on all four points to sustain the judgment. Lack of proof of any one of them, however, would have required the court to grant the motion for a directed verdict.

Conclusion.

In conclusion, we respectfully submit that the law in California extends the benefit of an express warranty only to those who stand in privity of contract to the seller. This rule is firmly settled as the policy of California and should not be upset by this Honorable Court on the strength of *Rogers v. Toni Home Permanent.*

If the requirement of privity of contract were dispensed with here, there would still be, it is submitted, insuperable hurdles in plaintiff's path, for

(a) she did not show that the pin curl solution was the proximate or physical cause of the loss of her hair;

(b) she did not show that the solution was dangerous, defective or improperly compounded;

(c) she did not show that any ads which came to her attention or to her mother's contained any warranty in fact or in law;

(d) she did not show that the kit was bought in reliance on any warranties of Rexall.

Finally, the trial court ruled erroneously, and to the prejudice of defendant Rexall in not striking the depositions of the Carlsons, and in admitting Exhibits 8 to 25 in evidence.

For all of these reasons, we respectfully urge that the judgment be reversed with directions to enter judgment for the defendant Rexall.

Respectfully submitted,

SPRAY, GOULD & BOWERS,

Attorneys for Defendant Rexall.

APPENDIX "A."

List of Exhibits Offered and Received.

Exhibit Number	Page in record where identified	Page where offered and rejected	Page in record where offered and admitted
1	165		165
2	168		197
3	169		
4	172		173
5	174		
6	179	180	
7	186		203
8 to 25, incl.	190		495-496
26	192		196
27	192		
28	203		204
29	205		206
30	284		285
31	284		285
32	285		286
33	285		286
34	460		467
	DEFENDANT'S EXHIBITS		
A	367		685
B	640		641
C, D, E, F	652		652
G	655		656

No. 16,282

IN THE

United States Court of Appeals

For the Ninth Circuit

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,
Appellants,

vs.

SANDRA MAE NIHILL, etc.,
Appellee.

REPLY BRIEF OF APPELLEE SANDRA MAE NIHILL.

LANIER, LANIER & KNOX,
By P. W. LANIER, JR.
A member of the firm
334 Gate City Building, Fargo, North Dakota,
Attorneys for Appellee, Sandra Mae Nihill

Subject Index

Table of Authorities Cited

Cases

Texts

No. 16,282

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Appellee.

REPLY BRIEF OF APPELLEE SANDRA MAE NIHILL.

Because the judgment herein is against two separate defendants under two separate and distinct theories and principles of liability, continuity of the brief of the appellee presents some difficulties. Therefore, even with the risk of repetition, appellee is treating the briefs of the two defendants separately, including the statement of the case.

THE DEFENDANT AND APPELLANT, ARNOLD L. LEWIS, DOING BUSINESS AS STUDIO COSMETICS COMPANY.

STATEMENT OF THE CASE.

Because appellee feels that the statement of the case of the appellants is in many places inaccurate, we are submitting our own statement of the case in very brief

form and are including record citations only where in conflict with the statement of the case by the appellants.

This is an appeal from a judgment for $48,000.00 in favor of appellee upon the verdict of a jury, in an action for damages for personal injuries, brought by Sandra Mae Nihill, a minor, against appellant, Arnold L. Lewis, the manufacturer of a home permanent wave preparation, and appellant, Rexall Drug Company, a corporation, the vendor of the product.

The appellee's mother purchased a home permanent wave kit from a Rexall Drug Store in Kensal, North Dakota. The home permanent was thereafter administered to the plaintiff who started to lose hair approximately a week to ten days later. Ultimately, and after a period of approximately four to five months, she lost most of her hair. Such loss is permanent.

At the time of the application the plaintiff, Sandra Nihill, was a normal healthy girl with no indicated allergy of any kind (R. 309-310, 332, 347-348, 630); she had no thyroid condition such as could effect or contribute to the loss of hair (R. 373-380, 392-393).

The chemical contained in the home wave solution here used contained Ammonium Thioglycolate, and said chemical is toxic through the skin as well as orally (R. 336-337, 357).

The home wave was given by a neighbor, Mrs. Jorgenson, who testified that she followed the directions exactly (R. 301); the mother of the plaintiff also testified that she was present and the directions were followed minutely (R. 403-410, 417-419, 428). Mrs. Jor-

genson testified that it was the neutralizer that she poured over and drained off the head of plaintiff (R. 289-293, 295, 304-305).

The record shows medical testimony on the chemical in the hair wave solution causing the loss of hair in plaintiff (R. 314-316, 354-357). There is medical opinion that this hair condition is permanent and three doctors so testified (R. 314, 334-335, 360).

The record shows by the testimony of Mrs. John W. Nihill that when Sandra's hair began falling out, "she was hurt", and that many times she found her crying, and would ask her what was wrong. She wouldn't tell. She began to get embarrassed. She didn't want to go out with the Nihills. She didn't even want to wear her dresses and when a new dress was suggested would say, "Oh, I can't wear that, I can't look dressed up". She refused to go to the Junior Prom and cried that night; that Sandra Mae would never admit why she was crying; that she would never admit that she had been injured; that her marks in school have gone down; that it has affected her whole personality; that she has no self-confidence any more; that she has no boyfriends, and that she used to have admirers (R. 412-414).

Mrs. Nihill was a subscriber to the "Farm Journal", a monthly periodical. The defendant, Rexall Drug Company, had advertised extensively for three years in many periodicals, including the "Farm Journal"; these advertisements carried warranties to the public in general; Mrs. Nihill read them and relied upon them; the home wave kit contained a written

guarantee which was read by Mrs. Nihill before purchase and relied upon.

ARGUMENT.

I.

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH ACTIONABLE NEGLIGENCE AGAINST THE APPELLANT MANUFACTURER.

It has been universally recognized by the courts that in cases of product liability, direct proof of negligence of the manufacturer is extremely difficult on the part of an injured plaintiff. Nevertheless, in this case, there was direct proof of negligence going far beyond the proof shown in most of the reported cases. The record shows:

1. The undisputed evidence of both plaintiff and defendants shows that the particular batch of cold wave used by the plaintiff came from Batch #181, and was purchased from a small country drug store in a town of 200 to 300 persons in February of 1955; that after the application and injury, another kit was purchased from the same drug store in June of 1955 by the plaintiff, and the proof shows that this was from Batch #181; that two other local residents purchased the same home wave kits from the same drug store the first part of March 1955, in between the two purchases of plaintiff, Mrs. Carl Carlson and Mrs. Donald Carlson (R. 533, 526-527). The testimony clearly shows that this was a Cara Nome Pin Curl Wave (R. 531-534); that these two persons had also a disastrous loss of hair, the only difference being that

½ PRICE

CARA NOME DEODORANT CREAM FOR WOMEN
Stainless, quick-vanishing base; protects after-bath freshness for hours.
Reg. $1.00 2 Oz. Jar Only 50¢

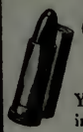
STAG DEODORANT CREAM FOR MEN Checks perspiration from shower to shower; won't harm your finest shirts.

Reg. 50¢ 1½ Oz. Jar Only 25¢

REXALL *DeLuxe* TOOTHBRUSHES
Each 59¢
Six medically approved styles with long-lasting Hyzon bristles, soft, medium or hard texture; two styles with natural bristles.

Beauty Special
SAVE MORE THAN ¼

Ann Delafield FACE POWDER (Regular or Compressed)
AND
Ann Delafield LIPSTICK
A $2.75 Value BOTH, ONLY $1.98



Your choice of 5 flattering shades in both powder and lipstick.

REXALL ASPIRIN

200's Reg. 87¢
ONLY 66¢
Less than ½ cent a tablet at this special low price during March.

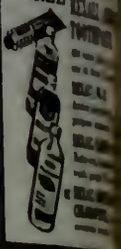
***New* REXALL SKIN ANTISEPTIC**

1 oz. bottle with applicator 33¢
Effective first-aid application for minor cuts, scratches, abrasions.

Sweet Tooth Special
HOMEMADE CHOCOLATE PEPPERMINT PATTIES
1 Lb. 69¢ Value Only 59¢

24 extra-large, fresh, creamy patties with rich chocolate coating.
American Custom Chocolates. Our finest assortment. 1 lb., $2.00
Kitchen Fresh Cottage Chocolates. Dairy-fresh creams, fruit centers, nuts. 1 lb. $1.10
2 lb. $2.20

FREE



MARCH REXALL

For Greater Savings at Drug Stores Everywhere

***NEW!* MITTENETTES** Reg. 50¢ now 39¢

For dishwashing, dusting, house cleaning, etc. Crepe-rubber mitts slip on easily, give finger-freedom and protection. Assorted colors.

SPONGE-CHAMOIS COMBINATION Genuine oil-tanned chamois plus large cellulose sponge. $2.69 value.....now $1.69

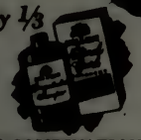
MOTH FUME CRYSTALS. Kill clothes moths, larvae! Odor vanishes in fresh air. Full pound, 79¢ value, only.....43¢

Cannon Dusting Cloth, 18" x 18".....only 23¢
Plastic Bib Apron.....only 23¢
Acco Bleached Cheesecloth, 4 yds. x 1 yd. wide....only 13¢
Elkay's Aerosol Air Refresher, 5 oz.....98¢
Window Cleaner.....23¢

BEAUTY BUYS

Save nearly ⅓

$3.50 value Both for $1.89



CARA NOME COMBINATION
Cara Nome Natural Curl Permanent, with "Neutralock" Neutralizer, assures soft, natural-looking waves from very first day. Choice of three kits for three different types of hair—normal, dyed or bleached, and grey or white hair.
Cara Nome Concentrated Shampoo conditions and beautifies hair, brings out natural sheen. Excellent cleaning action, penetrating properties; equally effective in hard or soft water—for all hair types.

CARA NOME COMBINATION
Peroxide U.S.P. 6% 20 vol., 4 oz.
FREE with purchase of any
CARA NOME Color Shampoo
Reg. $1.50 value Only $1.25

Both for the price of the shampoo! Cleanses, colors, conditions; not a bleach, not a rinse. Choose from 12 glamorous shades.

CARA NOME "Natural Curl" Permanent for Little Girls
Complete $1.50

Designed especially for girls age 2 to 12. Mild lotion and gentle-acting "Neutralock" Neutralizer assures safe, natural-looking curls for fine, "baby-soft" hair.

CARA NOME Liquid Lanolin Compound
4 oz. bottle $1.50

Exciting new lotion for "the one woman in ten with sensitive skin." As hair conditioner, it highlights natural beauty...as skin cleanser and emollient, this hypo-allergenic compound keeps complexion and hands radiantly lovely.

Three Lovely Lotions Just $1.00 each

CARA NOME, peach-blush pink, 6 oz. bottle
WHITE MINK, frosty blue.....6 oz. bottle
SPRINGWOOD, carefree yellow..6 oz. bottle
Cool, creamy lotions to protect the satin-smoothness of your skin and grace your dressing table. Each beautiful color a delightfully different fragrance.

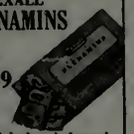
Cara Nome Make-up Stick conceals minor blemishes. Non-drying, non-greasy, 5 smart shades $1.50

Cara Nome Hair Rinse leaves hair soft, lustrous after shampoos and home permanents. 8 oz.....$1.00

Helen Cornell Hair Bandeau, smart-looking wide band to keep hair neat; elasticized, silky, knit-mesh, 39¢

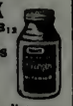
VITAMIN VALUES

REXALL PLENAMINS
72's $2.59



One of the best-balanced formulas known. Ten vitamins plus Iron, Liver Concentrate, Vitamin B_{12}. You get more than minimum daily requirements of *all* vitamins with known minimums.

REXALL MINERALIZED B COMPLEX With Vitamin B_{12}
100 Capsules $5.95



This *balanced* diet-supplement provides 9 B Vitamins, 11 mineral trace elements, Liver, Iron, Vitamin C. Each capsule gives more than minimum daily requirement of B_1, B_2 and Iron.

REXALL MULTI-VITAMIN FORMULA V-10
Pint $1.98

Pleasant-tasting liquid formula supplies twice the minimum daily requirement of Vitamin B_1, 5 times the requirement of Iron, plus Vitamins A, D, B_2 and B_{12}. Ideal for convalescents.

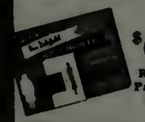
She found a new life when she lost 65 pounds with Ann Delafield's REDUCING PLAN

"Can you imagine the thrill of losing all the excess pounds you want ... *without starving, counting calories, or taking a drug?* It was the *first* time Nora Lacey met any success in losing weight, and she actually gained pep and energy while reducing!

"*It's easy—it's fun,* when you lose weight my way ... the *natural* way. And the wonderful thing is you lose it *for good* because my plan is a lifetime beauty plan."

Ann Delafield

"Start Today—Like Yourself Better Tomorrow"



YOU GET...
1. Big 120-page beauty book
2. 30 days' supply of Appetite Reducing Wafers
3. 30 days' supply of Vitamins

$6.95 Repeat Package $6.95

"Now I'm able to do the things I've always wanted. I'm not ashamed to go skating, dancing and to have all the fun I missed before. It's like being born all over again!"
Nora Lacey *(address on request)*

MEN For the first time ... a safe, sound scientific reducing plan for you! Ask for the Delafield 10-Day Quick Way. Repeat Package, 2.50 $3.50 Complete

You can depend on any drug

Rexall drug products are guaranteed to give satisfaction or your money back

YOUR MEDICINE CHEST CHECK LIST

BISMA-REX, Rexall's exclusive formula for quick, prolonged relief from acid-indigestion. Neutralizes excess stomach acidity; eases gastric distress; soothes irritated stomach membranes. 4¾ oz...89¢

REXALL ANAPAC combines antihistamine and APC Compound for quick, effective relief from cold symptoms in *all* stages—from warning sniffles to the aches and pains of fully developed colds. 15's, 49¢

REXALL CHERROSOTE, a time-tested cough syrup. Fights coughs from colds two ways: relieves "tickling throat"; loosens phlegm. Local anesthetic action soothes throat irritation. 8 oz., 98¢

REXALL CELUBEX LAXATIVE...a safe, modern dosage for constipation that promotes natural lubricating bulk, plus gentle laxative action for relieving temporary constipation. 65's...

REXALL BIOKETS, pleasant-tasting throat troches; combine local, pain-relieving ingredients with antibiotic action of Tyrothricin. Help "head-off" coughing spells and soothe minor throat irritation. 15's.....69¢

REXALL NASOTHRICIN *double-action* nose drops relieve nasal congestion, inhibit many bacteria, cover nasal passages more completely. Contain Tyrothricin and a vasoconstrictor. ½-oz. bottle and dropper.....69¢

REXALL LOZOTHRICIN, cherry-menthol flavored lozenges that combine pain-relief of aspirin with antibiotic action of Tyrothricin to soothe and help relieve coughs due to colds. Inhibit many bacteria. 12's .....69¢

REXALL COLD KIT, *four* laboratory-tested remedies for immediate treatment of family colds: Cherrosote Cough Syrup, Liquid Chest Rub, Nasothricin Nose Drops, Cold Tablets. Total value, $1.75 complete kit, only.....

REXALL LIQUID CHEST RUB...a new, *stainless, grenseless* chest rub that can also be used as inhalant in steam vaporizer. Deep-penetrating for quick relief from surface congestion. 2 oz., 79¢

REXALL OROTHRICIN antiseptic-antibiotic mouthwash and gargle. Freshens breath, inhibits organisms susceptible to Tyrothricin. Penetrates thoroughly, gives more complete coverage. ½ pt., 98¢

REXALL ASPIROIDS WITH ANTIHISTAMINE. Combines two tested remedies to give better all-around relief for discomforts associated with colds—headache, muscular pain and fever. 30's, 98¢

AEROSOL REX-SALVINE for Burns. Finger-tip controlled, antiseptic spray forms protective film to prevent infection, promote healing. Soothing, easy to use. 5 oz. ...$1.39

Chuckle with Amos 'n' Andy every Sunday, 7:30 p.m. EST, CBS Radio Network.

Right reserved to limit quantities. Prices subject to Federal Excise Tax where applicable. Items and prices may vary slightly in Canada. Rexall Drug Company, Los Angeles 48, California.

product that bears the name REXALL

the hair loss did not remain permanent, but grew back in.

2. That the bobby pins used in the process of the pin curl wave by the plaintiff and the other two parties were badly rusted and corroded in the morning after the wave.

3. That the solutions used by the plaintiff and the other parties smelled very strongly, smarted the eyes and stung the skin.

4. That the defendant, Arnold L. Lewis, by interrogatories, maintained that there was 5% Ammonium Thioglycolate used in the solution when, as a matter of fact, subsequent tests showed that there had been a 7% solution used, or, in other words, a 40% increase in the solution over that percentage testified to by the defendant as the intended or presumed percentage (R. 174-176).

5. The defendant himself, Arnold L. Lewis, in attempting to explain this difference, testified that at the time he answered "five percent" he thought the question was referring to the "little girls' home wave". The record shows that he knew the plaintiff was fourteen years of age at the time of the application (R. 677-682). He further testified that the "little girls' permanent wave kit" was for girls from 5 to 17 (R. 677). The advertisements in evidence positively state that the "little girls' kit" is for girls from 2 to 12 (Plaintiff's Exhibit 20, inserted opposite).

6. Dr. Melton testified that Ammonium Thioglycolate was toxic, and this was also admitted to by their own chemist. The medical testimony for the plaintiff

clearly shows that Sandra Mae Nihill had no skin allergy of any kind, and that her skin was not peculiarly sensitive to this or any other cosmetic.

The brief for the defendant, Arnold L. Lewis, argues throughout the weight of the testimony, which argument was proper when presented to the jury. But the brief totally overlooks the fact that it is a settled principle of law, that on appeal the facts must be viewed in the light most favorable to the prevailing party.

Therefore, we respectfully submit that there was adequate, direct proof of negligence to go to the jury.

II.

RES IPSA LOQUITUR.

The second contention of the defendant, Arnold L. Lewis, is that the doctrine of res ipsa loquitur was inapplicable, and if applicable, was improper in the form given by the court in the case at bar.

This contention is untenable and must be answered in several different ways. First, practically all jurisdictions concede the outstanding difficulty of the ascertainment and direct proof of some negligent act on the part of a manufacturer, and have answered this difficulty by allowing an inference of negligence by means of the maxim res ipsa loquitur. Where the defect is of the sort that does not ordinarily occur without the negligence of someone, where the product was within the defendant's exclusive control at the time during which the defect must have occurred, and where the possibility of contributing conduct which

would make the plaintiff responsible has been eliminated, this rule holds that there is sufficient evidence to justify a jury's *inferring* a specific act of negligence on the part of the defendant. Prosser, Torts 199-217 (Second Edition, 1955). In some jurisdictions this inference may be permissive, as in California, while in other jurisdictions this inference is presumptive. In *Burr v. Sherwin Williams Co.,* a 1954 California case, 268 P. 2d 1041, the California Supreme Court, by way of dictum, proposed that in all res ipsa loquitur cases the defendant must rebut the inference of negligence or be faced with a directed verdict for the plaintiff. For an excellent discussion of this aspect of the case see Note, 43 Calif. L. Rev. 146 (1955). In Pennsylvania the doctrine is known as "exclusive control", *Loch v. Confair,* 93 A. 2d 451. Maine, Michigan and South Carolina achieve the same result with "circumstantial evidence", *Lajoie v. Bilodeau,* 93 A. 2d 719; *Pattinson v. Coca Cola Bottling Co.,* 52 N.W. 2d 688; *Merchant v. Columbia Coca Cola Bot. Co.,* 51 S.E. 2d 749. Rhode Island allows an "inference of negligence" where res ipsa loquitur is not applicable, *Minutilla v. Providence Ice Cream Co.,* 144 Atl. 884.

Secondly, there can be no doubt that the law of the State of North Dakota is controlling in the case at bar. The brief of the defendant seems to presume, at all times and on all questions, that where the North Dakota Court has not spoken that the law of California applies. This whole theory is erroneous. The function of a Federal Court sitting in a diversity case is to apply the law of the controlling state *as the highest court of that state would have interpreted it had the*

question been presented to it. Luther v. Maple, 250 F. 2d 916.

Fortunately, it is not necessary, in this case, to resort to speculation upon the probable legal conclusions of the North Dakota Supreme Court as that court has spoken very clearly on almost identical situations as the case at bar. The first expression of the North Dakota Supreme Court on the inference of negligence is almost identical with the case at bar. In *Burt v. Lake Region Flying Service,* a North Dakota case decided in 1952 (54 N.W. 2d 339), the facts were these: Plaintiff, a farmer, entered into a contract with the defendant for the chemical spraying of certain farm crops. Plaintiff claimed that under that contract certain fields were carelessly and negligently sprayed by the defendant causing the production of oats in such fields to be retarded and injured. Upon the trial of the case the jury rendered a verdict in favor of the plaintiff. Prior to the submission of the case to the jury, the defendant made a motion for a directed verdict on account of the insufficiency of any evidence of negligence on its part. Said motion was denied. After verdict for the plaintiff, motion for judgment notwithstanding the verdict of the jury was made upon the same grounds of insufficiency of the evidence as to negligence. This motion was denied. Defendant appealed to the Supreme Court of North Dakota. The record is completely devoid of any proof of negligence. But, after spraying of the chemicals on certain fields, the plaintiff noticed that the oats were of a "dirty brown color". He then noticed other differences in the growth of the stools and a lack of kernels

in the heads. The proof further disclosed that the oats sprayed were inferior to oats not sprayed.

The North Dakota Supreme Court held:

"Clearly there is sufficient evidence from which a jury of reasonable men . . . could draw the inference that the damage to the oats was caused by the spray. *While there is no direct evidence of any negligence by the defendant, the circumstances were such that the jury could draw the inference that there must have been negligence by the defendant in the mixing or the application of the spray. There is no other reasonably proper explanation.*" (Italics that of the briefer by way of emphasis.)

"It is true that a verdict of negligence cannot be made to rest on mere speculation or conjecture. The evidence must present more than a mere possibility that the injury occurred in a particular way. However, it is likewise true that negligence, like any other fact, *may be proved by circumstantial evidence, and that such evidence is sufficient to sustain a finding or verdict if it shows that in all reasonable probability the plaintiff's injuries were the proximate result of the defendant's negligence.*"

"Negligence may be inferred from circumstances properly adduced in evidence, provided those circumstances raise a fair presumption of negligence; and circumstantial evidence alone may authorize the finding of negligence. Circumstantial proof relied upon need not be of the degree to expel all other probabilities, and will be sufficient to submit the issue to jury and to sustain its verdict based thereon, if the proof coincides with logic and reason and with that which a rea-

sonable mind would conclude from the testimony adduced."

In the above quoted case, the law of which is controlling in the case at bar, the Supreme Court of North Dakota conceded that there was *no* evidence of *any* negligence, and still allowed the inference of negligence from the circumstances or damage after application. In the case at bar there is much direct evidence of negligence, as set forth above. Hence, the case at bar is much stronger than *Burt v. Lake Region Flying Service.* Aside from this, the cases are almost identical. The whole theory of the complaint in negligence was based upon and drawn in compliance with *Burt v. Lake Region Flying Service.* In that case a chemical was purchased to spray crops. In this case a chemical was purchased to apply upon the head for a permanent wave. In that case the chemical was applied to the crops according to all of the rules and directions; in this case, the chemical was applied to the head in conformance with all the rules and directions. In that case there was a subsequent damaging to the crops; in this case there was a subsequent damage to the hair. In that case there was a conflict in testimony as to the cause of the crop damage or the extent; in this case there is a conflict in the testimony as to the cause of the hair loss and its extent. But, in both cases, under the ruling of the North Dakota Supreme Court, the inference of circumstances is clearly a question for the jury.

Just this year the North Dakota Supreme Court again passed upon the question of res ipsa loquitur as

applicable to the case at bar, in *Kuntz v. McQuade,* 95 N.W. 2d 430. The facts in that case were briefly these: The action was against a manufacturer-bottler for injuries sustained by a tavern keeper's infant son when a beer bottle exploded in a cooler. The jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial, which was denied, and upon which denial the appeal was taken. The evidence did not disclose the cause of the explosion. There was no evidence of direct negligence. The case was tried upon the stipulated theory of all parties that the doctrine of res ipsa loquitur was applicable, but that the doctrine itself gave rise to permissible inference of negligence rather than to a presumption of negligence. For this reason the North Dakota court did not directly pass upon either the applicability of the doctrine nor the form of the instruction. However, their reasoning on the applicability of the doctrine itself is clear, leaving only one question still undecided; that question being, is the North Dakota court going to follow the line of decisions that hold that the doctrine of res ipsa loquitur creates merely an inference of negligence, or that line of cases which holds that the doctrine of res ipsa loquitur creates a presumption of negligence. In the case at bar, the instruction itself is for a mere inference of negligence with the clear admonition that such inference is rebuttable by proof of non-negligence on the part of the defendant. In *Kuntz v. McQuade,* supra, the North Dakota Supreme Court said:

> "The plaintiffs had the burden of proof and while the doctrine of res ipsa loquitur gave them an assist it was not conclusive on the jury. No abuse

> of discretion is shown or found on the part of the trial court in denying the motion for a new trial. *The jury refused to draw the inference permitted them by the instruction given as requested by the plaintiffs.* That is the end of the matter." (Italics that of briefer)

Once again the North Dakota court has clearly looked with approval upon the submission to a jury in products liability cases of the theory of res ipsa loquitur. There can be no doubt that the North Dakota Supreme Court would hold res ipsa loquitur applicable in the case at bar, and let the jury decide the facts.

Thirdly, the brief for the defendant cites *Farmers Home Mutual Ins. Co. v. Grand Forks Imp. Co.,* 55 N. W. 2d 315. That case, however, has nothing to do with the case at bar. The plaintiffs were trying to establish the doctrine of res ipsa loquitur, not for the purpose of proving a prima facie case of negligence, but for the purpose of proving proximate cause. In the case at bar the testimony must be viewed in a light most favorable to the prevailing party, and there is clearly expert testimony throughout the record that the loss of hair was occasioned by the application of the home wave solution; that the plaintiff was a normal, healthy girl; that she had no allergies nor peculiar sensitivities; that there was no other reason for her hair to fall out starting within six or seven days after the application of the home wave, and even though there is testimony on the part of the defendants that the solution was not the cause of the loss of hair, this testimony is totally immaterial in view of

the jury's finding a belief and a conviction in the truth of the testimony of plaintiff's witnesses.

Then, add to this the testimony of the defendant's doctor himself, Dr. Henry E. Michelson, of Minneapolis, Minnesota, that the damage to the hair of the plaintiff was caused by "chemical interference" (R. 637).

Lastly, the defendant objects to the form of the instruction. Suffice it to say on this question that the instruction was taken almost in its entirety from *Bish v. Employer Liability Insurance Company,* a very recent federal case reported in 236 F. 2d 62.

III.

INHERENTLY DANGEROUS PRODUCT.

The brief of the defendant, Arnold L. Lewis, quarrels with the instruction of the court on the duty owed to the public by the manufacturer of a product that is "either inherently dangerous or reasonably certain to be dangerous if negligently made". It must be noted that the court in that instruction did not place any greater degree of care upon the manufacturer, but clearly stated in the instruction that the duty of the manufacturer "is to exercise *ordinary care* to the end that the product may be safely used for the purpose for which it was intended. . . . Failure to fulfill that duty is negligence".

We respectfully point out that counsel for the defendant has not submitted a single case to this court to support his contention that the instruction is even

erroneous, much less prejudicial error. We feel his contention falls for two reasons:

One, the record clearly shows testimony that ammonium thioglycolate is toxic by the testimony of Dr. Melton for the plaintiff, and conceded to be a fact by both Dr. Starr and Dr. Jeffreys for the defendant. Webster's definition of toxic is "poisonous". Anything which is poisonous is inherently dangerous or reasonably certain to be dangerous if negligently made.

Two, if the chemical was not toxic and was not to be classified as inherently dangerous, the instruction could be prejudicial error only if the burden of a greater degree of care had been placed upon the manufacturer. This not having been done, then even if we were to say that the instruction were erroneous, it by no means could be prejudicial and reversible error.

IV.

THE DEPOSITIONS OF MRS. DONALD CARLSON AND MRS. CARL CARLSON.

The defense objects to the introduction in testimony of the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson. The only objection made is as to foundation and, hence, no necessity to argue any other phase of the testimony. Wherein is there any failure in foundation? The defendant was represented by attorney at the time of the taking of the deposition. The record clearly shows that Kensal is a small country town of 200 to 300 people. The record shows that the

purchase of the product by plaintiff was made at the Rexall Drug Store in Kensal, North Dakota, in February of 1955, and that it was Batch #181. The record further shows that the plaintiff purchased another bottle of the solution from the same Rexall Drug Store in Kensal in June of 1955, and that this was also from Batch #181. Then, it is the testimony of both Mrs. Carl Carlson and Mrs. Donald Carlson that they made their purchases from the same Rexall Drug Store in Kensal, North Dakota, in March of 1955, in between the February and June purchases of the plaintiff. The inference is clear that the purchases of Mrs. Carl Carlson and of Mrs. Donald Carlson were also Batch #181, the identical batch which caused the damage to the hair of plaintiff. Even if this were not true and were not from the same batch number, the testimony would be admissible by mere virtue of the fact that it was the same product. *Carter v. Yardley & Co., Ltd.,* 64 N.E. 2d 693.

What other foundation is missing? Mrs. Donald Carlson testifies that she had used home wave solutions many times, and that in this particular case she followed the directions meticulously and carefully (R. 528). She testifies that as a result of the application of this home wave solution, the hair broke off while combing it, and that this started to happen no less than a week or no more than two weeks after the application (R. 529). She testified that the solution rusted the bobby pins. She was obviously using the same pin curl wave as she testified to the fact that the hair was put up in pins, that it rusted the bobby pins,

and that you took the bobby pins out the next morning; that the "Cara Nome" was the only bobby pin permanent that she ever had (R. 530). Counsel for the defendant himself asked about the pin curls (R. 531).

Mrs. Carl Carlson testified that after the purchase at Kensal from the Rexall Drug Company in March of 1955, she thoroughly read the rules and directions and meticulously followed the directions (R. 533); she testified that the solution was put on in pin curls (R. 534); that when she took the bobby pins out the next morning they were all rusty; that her hair was just like straw, and that upon combing her hair "her shoulders were just loaded with broken off short hair (R. 535); that she had never used any bleaching substance on her hair or peroxide or anything of that type, and that her daughter, Mrs. Donald Carlson, had never done so (R. 536).

It is obvious that there was ample foundation for the introduction of the testimony of the two Carlsons, and that their testimony was material.

It might also be well pointed out at this point that if the depositions of Mrs. Carl Carlson and Mrs. Donald Carlson were not admissible for any other purpose, they would still be admissible for the purposes of impeachment.

The proof introduced by the defendant stated that there had been only about eight complaints per year on their Cara Nome Home Wave solutions. Here we are able to show three bad complaints in one little, small, rural community in North Dakota.

V.

DAMAGES.

The briefer does not feel that the claim of excessiveness of the damages merits more than a passing comment. When a little fourteen year old girl ends up permanently bald headed, the damage to her appearance, her personality, her feelings and her emotions are so immense as to be almost beyond personal appreciation or comprehension of anyone unassociated with the injury. Her entire happiness is damaged; her future relations with the opposite sex, and even her marriage possibilities and probabilities are damaged; her future income is damaged. This damage and its computation is strictly for the jury, and it is difficult for the briefer tó visualize any verdict they might have assessed as being excessive.

CONCLUSION.

It is respectfully submitted that the record is completely void of any error requiring a new trial herein. There was positive, actual and direct evidence of negligence on the part of the defendant, Arnold L. Lewis; the case above and beyond that was properly submitted on res ipsa loquitur, and the jury arrived at a just and moderate verdict.

THE DEFENDANT AND APPELLANT, REXALL DRUG COMPANY.

Many of the contentions of the defendant, Rexall Drug Company, have already been answered in the foregoing brief in reply to the brief of the defendant, Arnold L. Lewis. Where this is true, plaintiff will not repeat. This leaves only three points to be argued: One, was there an express warranty; two, did the plaintiff or her mother rely on said warranty; three, is there necessity for privity in breach of an express warranty between manufacturer or distributor and the consumer in cosmetics containing chemicals applied to the human body?

I.

WAS THERE AN EXPRESS WARRANTY?

The witness, Thomas Henry Stark, was the assistant manager of the Insurance and Taxation Departments of the Rexall Drug Company and his job, among other things, was the supervisor of claims against Rexall. He was asked to produce and did produce advertising mats of ads run by the Rexall Company in the years 1953 and 1954 (R. 190). These ads were run in "Life", "Saturday Evening Post", and the "Farm Journal" (R. 152). These advertising mats were eighteen in number and were identified as Exhibits 8 through 25 inclusive. The briefer for illustrative purposes has included a photostat of Exhibit 13, inserted opposite, as being representative of all of the Exhibits,

ELKAYS

Insect Killer

Reg. $1.29
Now only
89¢

Quick, push-button exterminator of flies, mosquitoes, flying moths, fleas, silverfish, water bugs, gnats and other flying insects. Non-staining and non-injurious when used as directed. 12 oz. Aerosol.

4¾ oz.

89¢

INDIGESTION?

Get Quick, Prolonged 4-Way Relief with REXALL BISMA-REX

Neutralizes excess stomach acid in less than 1 minute—yet relief is prolonged. The ingredients in this effective Rexall formula quickly ease gastric distress and heartburn caused by food fermentation —and prolong relief by leaving a protective coating on the stomach membranes. Economy 1-lb. size.....$2.09

Bisma-Rex Gel. Liquid Antacid. 6-ounce bottle, only.....$1.19

Bisma-Rex Mates. Easy-to-take antacid tablets. 75's.....89¢

Try These Easy-to-Use, Push-Button AEROSOL AIDS

Rexall Insect Repellent. New, convenient spray for skin and clothing. Keeps away flies, mosquitoes, gnats and fleas. 5-ounce.....$1.59

Rexall Poison Ivy Lotion quickly relieves smarting and itching; helps prevent spreading of ivy, oak and sumac irritation. 5-ounce.....$1.69

Rexall Sunburn Cream. Gentle foam swiftly soothes pain; forms a protective film that prolongs relief from itching, irritation. 5-ounce..$1.49

Elkays Moth Proofer kills both moths and eggs. One spraying lasts a year, for clothing, closets, drawers and storage areas. Won't stain when used as directed. 12-ounce $1.95

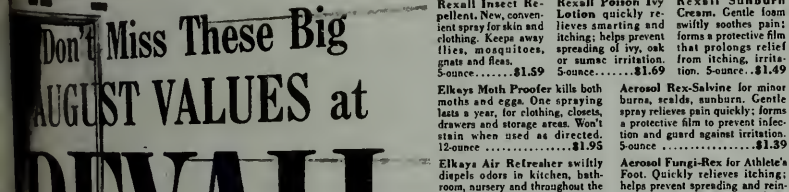
Elkays Air Refresher swiftly dispels odors in kitchen, bathroom, nursery and throughout the house. Push-button spray sweetens the air in any room. 5-ounce, 98¢

Cara Nome Hand & Body Foam, fragrant, fluffy lotion protects hands and body from roughness, redness and windburn. Just press the button and creamy foam billows out. 5-ounce.....$1.25

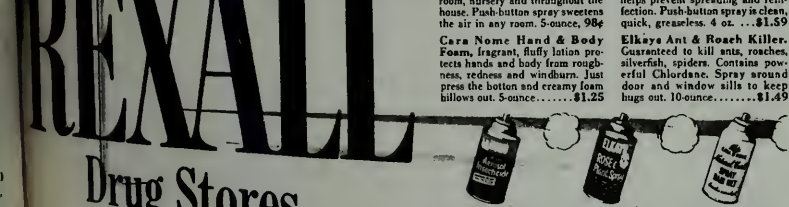
Aerosol Rex-Salvine for minor burns, scalds, sunburn. Gentle spray relieves pain quickly; forms a protective film to prevent infection and guard against irritation. 5-ounce $1.39

Aerosol Fungi-Rex for Athlete's Foot. Quickly relieves itching; helps prevent spreading and reinfection. Push-button spray is clean, quick, greaseless. 4 oz. ...$1.59

Elkays Ant & Roach Killer. Guaranteed to kill ants, roaches, silverfish, spiders. Contains powerful Chlordane. Spray around door and window sills to keep bugs out. 10-ounce.....$1.49



Don't Miss These Big AUGUST VALUES at REXALL Drug Stores



Elkays Insecticide with Methoxychlor. Contains no DDT. Kills flies, roaches, mosquitoes, ants, moths, fleas, bedbugs. 12-ounce $1.89

Elkays Robe & Plant Spray for indoor and outdoor use. Kills spider mites, leaf hoppers, aphids, thrips, and white fly. 12-ounce $1.69

Cara Nome Spray Hair Net with lanolin to leave your locks as lustrous as a model's. Helps keep hair "sculpture-neat." 5-ounce aerosol, $1.50

Rex-Maid Rubber Gloves,	Natural latex rubber; non-slip finish. Reg. 79¢	39¢
Rexall Aspirin,	No finer, faster-acting aspirin made. Family-size, 200-tablet bottle, reg. 67¢, now only.....	66¢
Klenzo Facial Tissues,	Soft absorbent tissues for many uses. Boxes of 300 tissues.....3 for	67¢
Cape Cod Vacuum Bottle,	Keeps liquids hot or cold. Pint, $1.59 value, now only.....	$1.39
Reel-Roll Cotton,	Handy dispenser lets you pull out cotton as needed. Rest stays inside, clean, ready for use. 1½ oz.	43¢
Rexall Sunburn Cream,	Quickly relieves itching and burning, lets you sleep easier. 3-oz. bottle.....	69¢
Alco-Rex,	Cooling, invigorating body rub that relieves simple muscular aches and pains caused by overwork, overexercise. Pint.....	49¢

A LUXURY BUY AT A LOW, LOW PRICE

Save 51¢ on Ann Delafield's All-Purpose Deep Cream and Skin Freshener

Now you can give yourself luxurious "beauty parlor" facials every day at home! Smooth on this rich All-Purpose Cream that penetrates the pores deeply, lubricates, cleanses, conditions and smooths. Remove cream and pat on Skin Freshener to stimulate and "tone up" the skin, leaving your complexion fresh, clear and glowing. These two exclusive formulas have everything you need for true, professional-type facials and complete complexion care. Save on both with this unusual special offer (limited time only). 2.35 oz. Cream: 6 oz. Freshener.

Total $3.00 Value **$2.49** *Both Only*

Drug Products Are Guaranteed to Give Satisfaction or Your Money Back

CARA NOME BEAUTY BUYS

½ PRICE SPECIAL

CARA NOME FACE POWDER *Large Size* $1.25

Reg. $2.50 ONLY

Super-fine texture; clings longer, spreads smoothly and leaves your face soft as a baby's. Pure, mild, safe for most sensitive skins. Delightful fragrance.

Compressed Bath Powder: Cara Nome, $2.00; Springwood, $2.50; White Mink, $3.00

SAVE MORE THAN $1.00

White Mink Cologne 4 oz. With Atomizer Reg. $3.50 Now Only $2.49

Cara Nome Cologne with atomizer. Reg. $2.50, only.....$1.49

Cara Nome Dusting Powder Reg. $2.50 $1.50

Use lots and lots of it after the bath. You'll love its airy softness, refreshing fragrance. *Only*

Cara Nome Deodorants: Perfumed Spray, 3 oz. ...$1.10. Cream, only...60¢

CARA NOME SUNTAN CREAM LOTION

4 Oz. Only $1.25

Actually filters out many ultra-violet "burn rays"; lets you get a glorious tan. Non-greasy.

CARA NOME NATURAL CURL PERMANENT

Silky-soft from the first day. 3 types: for Normal, Bleached or Dyed, or Gray-to-White hair; and one for little girls.

$1.50

CHECK THESE SUMMER MEDICINE CHEST NEEDS

REXALL ANTIHISTAMINE TABLETS. Relieve symptoms of cold and hay fever promptly with this formula containing Pyrilamine Maleate. Tablets are small, easy to take. Follow directions on label. Bottle of 15 **49¢**

REXALL EYELO. Soothing eye-wash cleanses and relieves discomfort of tired, irritated eyes. Contains cooling camphor and antiseptic boric acid. Comes with convenient eye cup. Half-pint, only..... **69¢**

FUNGI-REX CREASELESS. Promptly relieves the itching and discomfort of Athlete's Foot; helps prevent spreading and reinfection. Neat; non-greasy; has a vanishing cream base. Easy to use. 1½-oz. tube..... **75¢**

REXALL KLENZO ANTISEPTIC. This ruby-red mouthwash, gargle and antiseptic sweetens the breath, relieves simple throat irritations. Cinnamon flavored; pleasing to children and adults. Pint, only..... **79¢**

REXALL Mi-31 ANTISEPTIC. Rexall's multi-purpose antiseptic mouthwash and gargle. Used full strength, it kills contacted germs in 30 seconds. You save with this big, full-pint bottle.. **79¢**

NEW

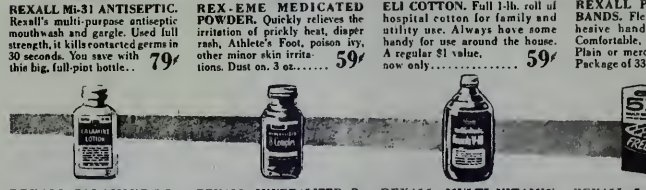
REX-EME MEDICATED POWDER. Quickly relieves the irritation of prickly heat, diaper rash, Athlete's Foot, poison ivy, other minor skin irritations. Dust on. 3 oz..... **59¢**

SAVE 41¢

ELI COTTON. Full 1-lb. roll of hospital cotton for family and utility use. Always have some handy for use around the house. A regular $1 value, now only..... **59¢**

SPECIAL

REXALL PLASTIC QUIK-BANDS. Flexible flesh-color adhesive bandages; waterproof. Comfortable, even on knuckles. Plain or mercurochrome. Package of 33, reg. 39¢.... **33¢**



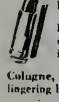
REXALL CALAMINE LOTION. This soothing pink lotion for heat rash relieves itching and irritation promptly: forms a protective layer that won't rub off the skin when dry but washes off easily in water. 4 oz. 35¢ Half-pint, only..... **57¢**

REXALL MINERALIZED B-COMPLEX. These potent tablets give you 9 important B Vitamins including red crystalline B_{12}, plus Liver, Iron, Vitamin C and 11 valuable minerals. A balanced dietary supplement. Bottle of 100..... **$5.95**

REXALL MULTI-VITAMIN FORMULA V-10. Pleasant-tasting tonic helps prevent simple, nutritional anemia; supplements diet with 5 times minimum daily requirement of Iron, plus Vitamins A, B_1, B_2, B_{12} and D. Full pint bottle..... **$1.98**

REXALL 5-X MULTI-VITAMINS. Free: 10-day trial size when you buy the 50-tablet bottle. Provide 5 times minimum daily requirement of all Vitamins with known minimums, plus red Vitamin B_{12} and Niacinamide. Both only..... **$6.95**

Have You Tried These Ann Delafield BEAUTY AIDS?



Lipsticks that stay on longer. 5 shades, $1.25

Face Powder, regular or compressed. 5 flattering shades..... $1.50

Cologne, a refreshing fragrance, lingering but subtle. 4 oz., $2.50

Eye Make-up Kit to beautify eyes, lashes. Blonde or brunette. Pretty plastic case..... $2.00 Cold color "luxury case"..$5.00

He Lost 54 Pounds and Looks 10 Years Younger

"The appetite reducing wafers and vitamins enabled me to accomplish all this with absolutely no discomfort or hunger. I had all I wanted to eat. I started feeling better immediately after starting the plan. Sports are pleasure instead of hard work. Thank you, Miss Delafield, for making reducing easy."

Ira R. Cobb
Los Angeles

WOMEN! Lose Up to 20 Pounds a Month with the Ann Delafield Reducing Plan for Women. This easy beauty-and-reducing plan gives you Appetite Reducers, Vitamins, big Beauty Book. Complete 30-day Kit, only.....$6.95

Repeat package, $5.85

MEN! Try This 10-Day Quick Way! You get Appetite Reducers, Vitamins, Reducing Book. Complete Kit of all 3, only.....$3.50

Repeat package, $2.50

You Can Depend on Any Drug Product that Bears This Name

Stag After-Shave Lotion. 3 oz. .....60¢

Rexall Sweet 'N-ete Sprinkle. Soluble sugar substitute. Gives all the taste, none of the calories. No bitter after-taste. 2¼ oz. shaker, equiv. to 200 teaspoons of sugar, 98¢

Rexall Monacet APC Tablets. Time-tested formula of Aspirin, Phenacetin, and Caffein—relieves cold discomfort. 25's.....33¢

Rexall Rubbing Alcohol A cooling, invigorating body rub that relieves minor muscular aches and pains caused by overwork or over-exertion. Reduces skin temperature. Pint.....69¢

Rexall Chlorophyll Mouth Wash. Refreshing, mint-flavored breath-sweetener and gargle. Pint.....79¢

Rexall Corn Solvent. Painlessly removes corns and skin calluses. ½ oz. .....35¢

Rexall Mineral Oil. Extra-heavy. Relieves ordinary constipation; can be used regularly as directed because action is entirely mechanical. Tasteless, odorless, non-habit forming. Not fattening. Pint.....69¢

Fungi-Rex Powder. Quickly and effectively relieves the itching discomfort of Athlete's Foot. Stops itching, soothes burning, helps prevent reinfection. 4 oz. .....59¢

Rexall Liquid Insect Repellent. 2 oz., 59¢

Rexall Milk of Magnesia Tablets. In handy, pocket-size tin. 36 tablets.....23¢

Rexall Boric Acid. Makes soothing solution for use in eyes, on nose, throat, and skin. Powder or crystals. 2-oz. container, 26¢

Rexall Epsom Salt. For temporary relief from constipation. 1 pound.....41¢

Rexall Stork Nursette. Complete baby feeding unit lets you make up formula for day in advance, keeps it sanitary for storage in refrigerator until needed. 35¢ each.....3 for $1.00

Rexall Flavored Aspirin for Children. Pleasant-tasting, orange-flavored. 50's. 35¢

Hy-De-Way Folding Syringe. More than 2 qts. capacity. With carrying case....$4.95

Rexall Hygienic Powder. Spray or gargle, soothes minor skin irritations. 6 oz., 75¢

Rexall Gypsy Cream. Cooling lotion relieves, soothes itching, burning of sunburn, other minor skin irritations. 8 oz. .....69¢

Cape Cod Lunch Kit with pint vacuum bottle. A roomy, sturdy, well-built kit, all metal. Perfect for school children and for the working man in the family. A $2.79 value, only $2.49

Rexall Foot Powder. Relieves discomforts of tired, tender, burning feet. Absorbs perspiration, destroys odors. Helps prevent irritation by reducing friction. 4 oz. .....39¢

Rexall Eudicalma Cream. Soothes, relieves minor skin irritations. 1½-oz. tube, 65¢

Rexall Zinc Oxide Ointment. Protects irritated skin, promotes healing. 1 oz., 23¢

Stag Spray Deodorant. Unbreakable plastic squeeze-bottle for quick, easy application. Gives effective protection from underarm odor, retards perspiration. 3½ oz. ..98¢

Rexall Glycerin Suppositories. Firm yet pliable. Adult or infant, 12's.....43¢

Rexall Pro-Cap Adhesive Tape. "Tri-Wide"—¼, ½ and ¾" widths on one spool. Waterproof. 5 yards.....59¢

Rexall Eudicaine Ointment. Relieves discomfort of sunburn, minor skin irritations, superficial burns, diaper rash. 1-oz. tube, 59¢

Rexall DeLuxe Toothbrushes. Hyzon bristles in 6 styles, or natural bristles in 2 styles. Soft, medium or hard textures...59¢

Cotton Squares, box of 40.....23¢

Rexall Cotton 'n Swabs......89¢

Rexall Couze Quik-Pads, 12's.....30¢

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Double your money back if you don't agree

REXALL ANAPAC

is the best COLD REMEDY

28

GUARANTEE

If you don't agree that Rexall Anapac is better than any other Cold Remedy, simply mail the unused portion and container together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Dept. F, 8480 Beverly Blvd., Los Angeles 54, Calif., and we'll give you twice the original purchase price in return.

Double your money back if you don't agree

CARA NOME NATURAL CURL

is the best HOME PERMANENT

GUARANTEE

If you don't agree that Cara Nome Natural Curl is better than any other Home Permanent, simply mail the unused portion and container together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Dept. F, 8480 Beverly Blvd., Los Angeles 54, Calif., and we'll give you twice the original purchase price in return.

8 through 25 inclusive. It will be noted that there are two express warranties on this exhibit. The first says, "Rexall Drug Products are Guaranteed to Give Satisfaction or Your Money Back". The second says, "You can Depend on Any Drug Product that Bears This Name REXALL".

The plaintiff's mother, Mrs. John Nihill, testified that she keeps and subscribes to the "Farm Journal", one of the periodicals conceded by the defendant to carry their ads. She testifies that she has seen the ads of Rexall, including Cara Nome Pin Curl Waves, in these periodicals, and that she read those ads prior to February 5, 1955, and that she had seen them advertised for about two years, and that this was the reason she purchased Rexall Cara Nome (R. 400-401).

It was testified to by Mrs. Nihill that Exhibit 28 was a part of the Cara Nome Rexall Kit purchased by her at the Rexall Drug Company (R. 402). A photostat of this exhibit is inserted opposite. It states:

"Double your money back if you don't agree
CARA NOME NATURAL CURL
is the best HOME PERMANENT
GUARANTEE"

Mrs. John Nihill further testifies that Exhibit 7 was seen by her on the counter where there was "a pile of them with his display of Cara Nome Home Pin Curl" (R. 401-402). This is verbatim the exact same

guarantee included in the wave kit itself. A photostat of Exhibit 7 has been inserted opposite. Then, we have the phenomenal situation of both the defendant manufacturer and the defendant distributor disclaiming any knowledge of or connection with these two express warranties, one contained in the kit itself, and the other a part of the display material of the retailer. This denial, in the face of the printed Rexall guarantee, including the return address of the Rexall Drug Company in Los Angeles, is ridiculous.

Long ago in 1894 the Supreme Court of the State of North Dakota in *Hazelton Boiler Company v. Fargo Gas and Electric Company,* 61 N.W. 151, where the sale of an upright steam boiler was involved, construed the following language to be a warranty:

> "We hereby guaranty that the boiler in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit, which we guaranty to be a saving of at least twenty per cent in fuel over any horizontal tubular boiler."

The court held the last clause, "Which we guaranty to be a saving of at least twenty percent in fuel over any horizontal tubular boiler" was a definite warranty, was legally binding and was not a mere expression of opinion or "puffing" on the part of the vendor. The language of "guaranty" therein construed, provided no stronger inducement for purchase than defendant's choice of language here, as both were designed to effect their end, namely, sales. This case clearly indicates the North Dakota Court's attitude toward holding expressions of guaranty as warranties.

Double your money back if you don't agree

CARA NOME NATURAL CURL

is the best HOME PERMANENT

GUARANTEE

If you don't agree that Cara Nome Natural Curl is better than any other Home Permanent, simply mail the unused portion and container together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Dept. F, 8480 Beverly Blvd., Los Angeles 54, Calif., and we'll give you twice the original purchase price in return.

Double your money back if you don't agree

REXALL ANAPAC

is the best COLD REMEDY

GUARANTEE

If you don't agree that Rexall Anapac is better than any other Cold Remedy, simply mail the unused portion and container together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Dept. F, 8480 Beverly Blvd., Los Angeles 54, Calif., and we'll give you twice the original purchase price in return.

II.

DID THE PLAINTIFF OR HER MOTHER RELY ON SAID WARRANTY?

Under cross-examination by counsel for the defendant, Rexall Company, Mrs. John Nihill testified that she picked up Exhibit 7 in the Kensal Rexall Drug Store, and that she relied upon Cara Nome products as being safe and good products, and that she had seen them advertised in various periodicals before that time (R. 431). Mrs. Nihill testified that she saved both guarantees, Exhibits 7 and 28 (R. 434-436). Further, under cross-examination by the attorney for the defendant, Rexall Company, Mrs. Nihill testified that she read the ads in the "Farm Journal"; that they said, in effect, "Rexall Drugs stands behind all its products", and that she relied upon that warranty (R. 443).

Lastly, on the instruction sheet itself contained within the permanent wave kit, is the flat statement, "safer". This is not only a warranty of safeness, but is in the comparative form implying that it is safer than any other product.

III.

IS THERE NECESSITY FOR PRIVITY IN BREACH OF AN EXPRESS WARRANTY BETWEEN MANUFACTURER OR DISTRIBUTOR AND THE CONSUMER IN COSMETICS CONTAINING CHEMICALS APPLIED TO THE HUMAN BODY?

Lack of privity of contract does not bar an action for breach of an express warranty made to induce

purchase or other forms of reliance upon it. Advertisements, in any event, are taken into consideration in deciding the existence of a warranty. *King v. Ohio Valley Termanix Co.,* (Ky. 1948) 214 S.W. 2d 993; *Turner v. Central Airway Company,* (Mo. 1945) 186 S.W. 2d 603.

Probably the leading case is *Baxter v. Ford Motor Company* (Wash. 1932) 35 P. 2d 1090. In that case the manufacturer was held strictly liable for inaccurate advertising, reliance upon which ultimately led to the purchaser's injuries.

A most recent case is a very similar cosmetics case, *Rogers v. Toni Home Permanent Company* (Ohio, 1958) 147 N.E. 2d 612. The court said:

> "Today many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their

described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious."

The only dissent in that case is as to whether or not this same principle should be applied to breach of implied warranties. The principle has now become settled that the manufacturer is liable to the ultimate consumer for breach of express warranty, said warranty being given either through the use of public advertising or the issuance of guarantees.

In *Free v. Sluss* (Cal. 1948) 197 P. 2d 854, 856, the plaintiff retailer had bought from a wholesaler soap sealed by defendant manufacturer with a printed guarantee of quality and of refund of purchase price by the dealer in the event of dissatisfaction. The manufacturer was held liable for plaintiff's financial loss on unmerchantability. The court said:

"As to the manufacturer, we have concluded that the guarantee of quality printed on each package of soap reached beyond the dealers to persons in

> the positions of plaintiffs. It establishes the manufacturer's knowledge and intention that the goods should move through the usual channels of trade and was a representation addressed to those who deal in its product. It was under no obligation to make the guarantee, but having made it, it does not lie in its mouth to repudiate it when the condition of complete unsuitability for the market brings the guarantee into play."

It is to be particularly noted that all jurisdictions, without the necessity of citations, are uniform in holding no necessity for privity of contract between manufacturers and consumers or distributors and consumers, on either express or implied warranties in food and drug cases, as is so ably pointed out in *Rogers v. Toni Home Permanent Company,* supra. Is there any logical or just reason for any distinction between those products which are consumed within the human body causing harm, and those products which are applied to the outside of the human body and cause harm?

CONCLUSION.

It is respectfully submitted that the verdict should be in all things sustained against the manufacturer defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, upon the grounds and for the reasons that there was adequate showing of negligence in the product sold and purchased, and that further, the case was properly submitted to the jury upon the doctrine of res ipsa loquitur; that the verdict of the

jury should be sustained against the defendant, Rexall Drug Company, upon the grounds and for the reason that their advertising and written guarantees constitute an express warranty which was relied upon by the minor plaintiff and her mother.

Dated, Fargo, North Dakota,
July 27, 1959.

Respectfully submitted,
LANIER, LANIER & KNOX,
By P. W. LANIER, JR.
A member of the firm
Attorneys for Appellee,
Sandra Mae Nihill

No. 16282.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,

Appellants,

vs.

SANDRA MAE NIHILL, etc.,

Appellee.

Reply Brief of Appellant Arnold L. Lewis, Doing Business as Studio Cosmetics Company.

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vs.

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Appellee.

Reply Brief of Appellant Arnold L. Lewis, Doing Business as Studio Cosmetics Company.

A careful analysis of appellee's brief discloses a treatment so light as to suggest an inability to satisfactorily answer the substantial points raised in appellant's opening brief.

I.

The Evidence Was Utterly Insufficient to Establish Actionable Negligence Against the Manufacturer.

Appellant again refers to the full and detailed statement of facts set forth in the opening brief. While appellee proclaims that the statement of the case in appellant's opening brief is inaccurate "in many places," no effort has been made to point out any claimed inaccuracy. On the other hand, some of the "facts" as set forth by appellee cannot remain unchallenged. It is asserted that the chemical ammonium thioglycolate is "toxic" through "the skin

as well as orally" (Appellee's Br. p. 2). In support are transcript references to pages 336, 337 and 357. The most that can be said for these references is that Dr. Melton testified that "thio" *in certain concentrates* (not identified by the doctor voluntarily or at appellee's suggestion), "can be harmful in the sense that other allergic reactions can occur in concentrations that are used. Alopecia *may* occur and toxic reactions have been *reported*" [R. p. 337; emphasis added].

This doctor did *not* testify that "thio" was toxic when *applied to the scalp.* Appellant does not claim that "thio" is designed for human consumption. Appellant does assert that the evidence demonstrates that "thio," since 1941 (a period of fourteen years, at the time of this lawsuit) has been an effective method for waving the hair of millions of American women.

Under Point I of appellee's brief are listed certain pieces of evidence which are claimed to furnish a foundation for the judgment.

(1) It is suggested that the bobby pins were rusted and corroded the day following the permanent. (Obviously after the use of water, the permanent wave solution, and the neutralizer.) There is absolutely no probative value to this so-called piece of evidence. There is no evidence as to *why* the bobby pins were rusted or corroded. It is only by resort to the rankest type of speculation that one could draw a relationship between the rusting of a metal bobby pin and alleged damage to human hair.[1] Rust and corrosion are processes that constantly take place in

[1]Every swimming pool owner has had the job at one time or another of removing rusted and corroded bobby pins from the bottom of the pool, yet the swimmers suffered no damage to their hair.

metals, *without* the intervention of any type of chemicals. The ordinary iron skillet is found rusted on the bottom in the morning if ordinary water has been permitted to remain on the surface of the metal.

(2) Appellee urges that the *solution* smelled "very strongly, smarted the eyes and stung the skin" (Appellee's Br. p. 5), although no transcript references are cited. This evidence likewise has *no probative value.* Again it is a matter of common knowledge that anything with ammonia in it smells "strong." In using ordinary household ammonia, everyone has smelled the strong odor. There is not one scintilla of evidence, expert or otherwise, that the "strong smell" would in any manner affect the product in question. Any ammonia preparation may "sting" the skin. The *instructions themselves* suggest the use of "rubber gloves" if the hands are sore or chapped or sensitive (Appx. B, Op. Br. of Appellant Lewis).

It is interesting to note that plaintiff's witness Mrs. Carlson stated as follows:

> "Q. Could you describe to me whether or not when you opened the bottle of Cara Nome that it had any unusual odor? A. None other than *the smell that most permanents have"* [R. p. 529, italics added].

As to the supposed burning or stinging, Mrs. Carlson testified:

> "Q. Would you tell me whether or not the use of it on your hands or on your scalp produced any unusual sensation? A. Well, slight burning. I mean that's not really a burn. It's just that your hands may be tired from putting up pins, but they feel hot. . . .

> Q. Was this particular burning sensation such as you have described any different than that used by or felt by you in other home wave solutions? A. *I don't believe so . . .*" [R. pp. 529-530].

Mrs. Carl Carlson, with reference to the *odor,* testified that, "Well, they *all* got a pretty hot smell" [R. p. 534]. *Plaintiff herself made no claim that she had* ANY *burning sensation during the administration of the wave.*

> "Q. You didn't have any burning sensation or feeling while it was being given to you? A. No" [R. p. 237].

(3) Appellee attempts to infer that there was an increase of 40 per cent in the "thio" content over the *"intended"* or "presumed" percentage (Appellee's Br. p. 5).

This argument is specious and without any legitimate foundation. Lewis manufactured several types of home permanent kits. One was a kit for small girls (2-12 years) which contained approximately 5 per cent "thio." The kit in question contained approximately 7 per cent "thio" and was *intended* to contain that percentage. *No question of increase in percentage is involved at all.* Appellee attempts to erect a "straw man." Plaintiff purchased an adult kit and claims to have used *that* kit. Plaintiffs had in the courtroom and in evidence a bottle of the solution from the same batch and *never had it opened and analyzed.* It was within appellee's admitted power in this case to have proven the *precise chemical content of the preparation.*[2]

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[2]See reply brief, page 4, where appellee states that direct proof of negligence on the part of the manufacturer is difficult. Yet here, contrary to most cases, plaintiff actually had a sample from the identical batch #181 in her possession and did nothing about it.

Appellee has neither produced nor pointed to *any* evidence indicating that ammonium thioglycolate in the percentage used in this case or in any other percentage *is in any manner harmful to the hair of human beings.* More important, the evidence shows without conflict that appellant manufactured the preparation in conformity with the standards in the industry.

(4) This suggested that Dr. Melton testified that "thio" was toxic. As has already been pointed out he gave *no* such testimony.

(5) The testimony of the Carlsons is worthless in attempting to establish negligence on the part of the manufacturer. The statement that these two persons "had also a *disastrous loss of hair*" (Appellee's Br. p. 4) is utterly inaccurate. These women had the *ends* of the hair split, it changed color and was strawy and dry [R. p. 528]. Both got hair cuts and *had no further problem.*

Counsel has completely ignored the fact that liability against the manufacturer is predicated on fault. What evidence establishes negligence on the part of the defendant manufacturer? There is no evidence that the formula was improper or not one customarily used by reputable manufacturers of cosmetics. The burden of proof was upon plaintiff to establish negligence. There is no evidence that the particular batch or any batch was improperly compounded, although plaintiff had in her attorney's possession and later in evidence [Pltf. Ex. 34, R. p. 467] a bottle of the solution from the *same batch.* Plaintiff's power and ability to produce evidence on this score was unhindered—if she claimed the "thio" content was improper surely she would have had a chemist analyze the sample. For reasons of his own counsel did not see fit to gamble on a chemical analysis which would have revealed a normal "thio" content.

II.

The Doctrine of Res Ipsa Loquitur Was Clearly Not Applicable.

The North Dakota Court has actually only two cases dealing with the doctrine of *res ipsa loquitur*. The case of *Burt v. Lake Region Hair Service,* 54 N. W. 2d 339 (N. D., 1952), does not deal with the court's interpretation of the doctrine *res ipsa loquitur*. *No criteria* are set forth by the court for its application and the case actually stands for the proposition that under the peculiar facts of the case, there was sufficient *circumstantial* evidence of negligence to support the verdict.

In the only two later cases where the court expressly refers to the doctrine, *no mention whatever* is made of the *Burt* case.

The case of *Kuntz v. McQuade,* 95 N. W. 2d 430, relied on by appellee is *not helpful* for the reason that the parties *stipulated* to try the "exploding bottle" case on the theory of *res ipsa loquitur*. The defendant prevailed and on appeal the court merely held that since the case was tried on the theory that *res ipsa loquitur* applied, plaintiff was in no position to complain on appeal and that the jury was not bound to find in accordance with any inference that might emanate from the *stipulated* application of the doctrine.

The only case directly in point is *Farmers Home Mut. Ins. Co. v. Grand Forks Imp. Co.,* 55 N. W. 2d 315. Appellees attempt to thwart the application of the *Farmers* case *cannot prevail*. The language from this Opinion set forth on pages 33 and 34 of the opening brief of Lewis clearly supports the conclusion that North Dakota is in step with California and the vast majority of states *is*

rejecting the application of the doctrine where there is *no balance* of probabilities in favor of negligence on the part of the defendant.

How can there be any balanced probabilities where there is a serious conflict as to the manner of the application of the solution and the neutralizer; where the evidence reveals without conflict the persistent use of a prescription drug to the hair for a period of months, under circumstances not *shown to have been in accord with the orders* prescribed by the doctor; where there was evidence that the plaintiff's condition may well have been due to a thyroid condition, for which her own doctor prescribed thyroid; where plaintiff's own medical evidence failed to indicate the strength of the solution of "thio" that might presumably be necessary to damage hair; where as opposed to plaintiff's alleged injury there were (in addition to the other manufacturers of like products) some 400,000 Cara Nome kits sold each year with only an average of eight claims; where plaintiff's own Dr. Martin conceded that selsum, the drug he prescribed at a time when plaintiff had not lost her hair "could cause falling hair" [R. p. 320]; where there was never any history of a chemical burn, mild or otherwise; where there was evidence that plaintiff was suffering from seporrhic dermatitis, a condition having its onset at puberty; where there was ample evidence that plaintiff was suffering from alopecia arcataie, a loss of hair *from unknown causes.* These and many other facts clearly spelled out in the evidence, effectively demonstrate that no balance of probabilities exists pointing to any negligence and prevent the application of the doctrine. The plaintiff has failed to make out a *prima facie* case of liability.

Farmers Home Mut. Ins. Co. v. Grand Forks Imp. Co., 55 N. W. 2d 315 at 317-318.

The appellee relies for the form of the criticized instruction on *res ipsa loquitur* on *Bish v. Employers Liability Ins. Co.,* 236 F. 2d 62. Actually little similarity appears between the trial court's instruction on *res ipsa loquitur* and the instruction in the *Bish* case (*supra*). In that case the court instructed the jury in part as follows:

> "The product put out by the Toni Company known as the Toni permanent wave—Toni Cold Permanent Wave; if put out according to its formula, is not negligence. In other words, the product that is put out by the Toni Company, if put out in accordance with its formula, is not per se negligence in itself, because the evidence is overwhelming to the effect that there are millions of bottles of it put out and used from which no injury occurs, and in the preparation of which there is no negligence, so that in this particular case, for the plaintiff to win, the plaintiff must show that there was negligence in the manufacturing of the particular Toni product that was purchased and used by this plaintiff—the plaintiff must show that before the plaintiff can recover, and it must be based on such negligence." (236 F. 2d 62 at 68.)

When appellee states that she took the criticized instruction "almost in its entirety" from the *Bish* case (Appellee's Br. p. 13) she is obviously inaccurate and it clearly appears that the quoted instruction (as well as others) from the *Bish* case were omitted by appellee.

It is submitted that appellee has failed to support the giving of the *res ipsa loquitur* instruction.

III.

It Was Error to Instruct on the Theory of an Inherently Dangerous Product.

Counsel states that no authority is presented in support. Please see the case of *Bish v. Employers Liability Ins. Co.*, 236 F. 2d 62, *relied upon by appellee.*

In the *Bish* case, a thioglycolate case, the

> "plaintiff urges the application of the rule that 'The manufacturer may be liable for failure to instruct as to the safe method of use of a pharmaceutical preparation which is inherently dangerous.' . . . We can subscribe to this statement, *but it has no* application here. The assumption that the Toni preparation is *inherently dangerous is not justified by the record.*" (236 F. 2d at 69.) (Emphasis added.)

The Court of Appeals points out in the *Bish* case that it is not negligence to fail to warn of a danger where there is only a "remote possibility of danger" (p. 69).

Clearly the court's instruction, promptly objected to, relating to a product "inherently dangerous" was extremely prejudicial to appellant. Inherent in the wording of the criticized instruction is the concept that the product in question was in fact "inherently dangerous." *The record fails to substantiate any such theory.* Thioglycolate was just as "toxic" in the *Bish* case as in the case at bar. Appellee's argument is indeed a desperate one. Many common household items are "toxic" if consumed internally and yet are perfectly safe when used on the hands, feet, hair or body. Here too, the record is utterly devoid of evidence from any of plaintiff's doctors indicating that "thio" is anything other than a well-recognized hair preparation, and not harmful in the concentrations involved herein.

Conclusion.

It is respectfully submitted that appellee has not answered appellant's contentions; that the record is devoid of any proof of negligence on the part of the manufacturer; that there is no basis for the application of the doctrine *res ipsa loquitur*. That a jury of lay persons, misled by passion and prejudice, has imposed liability upon this defendant without any showing of fault and under circumstances where in no event, under a fair appraisal of the evidence, can here be said to be any balance of probabilities pointing to any negligence on the part of this appellant. The judgment should be reversed.

Respectfully submitted,

REED, CALLAWAY, KIRTLAND & PACKARD,

and

HENRY E. KAPPLER,

Attorneys for Appellant Arnold L. Lewis, Doing Business as Studio Cosmetics Company.

No. 16,282

IN THE

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Appellants,

vs.

SANDRA MAE NIHIL, etc.

Appellee.

REPLY BRIEF OF REXALL DRUG COMPANY.

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Appellee.

REPLY BRIEF OF REXALL DRUG COMPANY.

The Opening Brief of appellant Rexall contained seven separate main points. Appellee replies directly to only three of these, namely, (1) whether an express warranty was made by Rexall, (2) whether appellee or her mother relied on it, and (3) whether privity of contract is required between appellee and Rexall before the warranty can extend to the appellee.

The other four points, we are told, are common with the points made by appellant Lewis They are said to be answered in that part of appellee's brief which deals with the contentions of the appellant Lewis

After several readings of the brief filed on behalf of appellee, we are unable to discover what she has to say on the choice of law question, discussed in our Point I,

on the proposition discussed in Point V that there was not sufficient evidence that the solution used had any defect, or that it was without the tolerance limits of hair curling preparations generally, containing thioglycolate, nor on the question of the admission in evidence of Exhibits 8-25, discussed in our Point VI.

These matters are passed over in discrete silence. Most of the cases we mention in points II, III, and IV are ignored. Perhaps appellee hopes to divert the attention of this Honorable Court from such authorities as *Briggs v. National Industries, Inc.,* 92 Cal. App. 2d 542, 207 P. 2d 110, or *Sheptur v. Proctor & Gamble Distributing Co.* (C. C. A. 6, 1958) 261 F. 2d 221, under which her case is not tenable. We are justified in assuming that appellee is unable to answer the portions which her brief does not discuss

Appellee says that some of the contentions of appellant Rexall are touched upon and answered in that portion of her argument which attempts to answer the separate brief of appellant Lewis. To the extent that this is the case, we adopt and rely on the reply which the Closing Brief of appellant Lewis is making thereto. This leaves for consideration only the three points previously mentioned, namely, (I) Was there an express warranty? (Brief of Appellee pp. 18-20); (II) Did the Plaintiff or her mother rely on said Warranty? (Brief of Appellee p. 21); (III) Is there necessity for privity? (Brief of Appellee pp. 21-24).

I.

Was There an Express Warranty?

(Answer to Brief of Appellee pp 18-20).

Appellee correctly limits the issue to an *express warranty*. Whether or not an express warranty was made must be determined exclusively by reference to Exhibits 7, 25, and 28. All of these exhibits have been transmitted to this Honorable Court. Appellee's brief reproduces Exhibit 13 as typical of all advertising. It also reproduces Exhibits 7 and 28, the "guarantees" allegedly found in the Cara Nome carton after it was opened at home and on a handbill obtained separately at the drugstore in Kensal at the time of the alleged purchase of the Cara Nome solution.

Exhibit 13 strikingly illustrates the correctness of our contention that no warranty was made with respect to the Cara Nome preparation in any of the advertising material represented by Exhibits 8-25. When Exhibit 13 is examined, the following language appears thereon:

> "Rexall Drug products are guaranteed to give satisfaction or your money back" and "You can depend on any drug product that bears this name Rexall."

Leaving aside for the moment whether these words are words of warranty, it is immediately clear that the assertion of dependability extends to Rexall *drug* products and *drug* products which bear the Rexall name. There are two limitations in this wording. First, it must be a *drug* product; second, it must bear the *name of Rexall.*

Obviously, the Cara Nome solution does not fall within either of these two classes. It is plainly not a "drug product" On the contrary, it is a cosmetic product Webster defines "drug" as

> "Any substance used as a medicine, or in making medicines; also, formerly, any stuff used in dyeing or in chemical operations 2. An article of slow sale or in no demand; as, a drug on (or in) the market. 3. A narcotic substance or preparation."

Likewise, Cara Nome does not bear the name "Rexall" on any of Exhibits 8-25. The ad in question includes in its language both drug and cosmetic products as well as articles for more general use, such as utensils of various kinds, cleaning preparations of various kinds, and even rubber gloves. The distinction is so obvious that we feel it unnecessary to make a prolonged list of the various categories of merchandise found in the ad. Not all of them are drugs, and the majority of them do not bear the name "Rexall".

If we now turn our attention to the trade name Cara Nome, we see that none of the Cara Nome products fall into the classification of drugs. There is face powder, dusting powder, White Mink cologne, Suntan Cream Lotion and, finally, Cara Nome Natural Curl Permanent. None of these is in the nature of drugs, as we have previously stated.

Assuming, however, contrary to the fact, that Cara Nome Natural Curl Permanent is a drug rather than a cosmetic, and assuming, contrary to the fact, that it displays the Rexall name, the only language pertaining to the nature of that product specifically is as follows:

> "Silky-soft from the first day. Three types: for normal, bleached or dyed, or gray-to white hair, and one for little girls."

None of these words even approaches the classification of a warranty and cannot by any device be stretched to fit the requirements of a warranty.

Exhibits 7 and 28 are called a guarantee. The word "warranty" does not occur in this guarantee. We do not claim that this would be necessary if the language otherwise indicated an intention to make a warranty. If the words used in Exhibits 7 and 28 were a warranty, they would limit themselves strictly to the terms of the offer in the warranty, namely, the refund of the original purchase price together with a signed letter stating why the person purchasing the article found the product unsatisfactory. There is no proof that such a demand was made, nor any proof that Rexall would have refused to honor the demand if it had received such a demand. The letter which was written to Rexall following the claimed use of the Cara Nome product was not a demand to perform in accordance with the words of the guarantee.

There is one more reason why neither of the Exhibits comprised in the advertising series [Exs. 8-25] nor the two claimed guarantees [Exs. 7 and 28] constitute a warranty and that is the fact that none of the Exhibits used words which are in the nature of a warranty. On the contrary, they plainly fall within the classification of puffing. The only answer which appellee makes is a brief reference to one North Dakota case, namely, *Hazelton Boiler Co. v. Fargo Gas & Elec. Co.* (N. Dak. 1894), 61 N. W. 151. The gist of that warranty was that the boiler would evaporate a certain amount of water from the use of one pound of coal, and that in that manner at least 20 per cent in fuel would be saved. The warranty was of specific things. The example is not applicable.

When it comes to drawing a distinction between warranty and puffing, the nature of the words used is all

important. We refer to an annotation in 158 A. L. R. 1413, 1419, in which a number of examples appear, showing clearly a difference between dealers or trade talk or seller's opinions and warranties. This annotation first refers to the general discussion of the subject in 46 Am. Jur., Sales, p. 278, and then gives a number of illustrations of what should be considered trade talk and what should be considered a warranty. We quote several cases from this annotation because they clearly show the distinction between appellee's lone case on the subject and the trend of the decisions.

> "On the theory that the advertising statement complained of did not exceed commendatory, if exaggerated, statements amounting to 'dealer's' or 'trade talk' and contained no positive false statements of fact it was held in James Spear Stove & Heating Co. v. General Electric Co. (1934; DC) 12 F Supp 977 (affirmed in (1935; CCA 3d) 80 F 2d 1012), that there could be no recovery in an action for deceit by the distributor of automatic heat-control devices for home heating manufactured or furnished by the defendant, on the facts that the latter submitted a book of advertising describing the various products, containing among other things copies of advertising matter submitted to magazines and for public perusal, stating that the equipment was 'far beyond competitive devices in quality of manufacture, dependability and precision of operation,' that in it there was the 'same mechanical dependability that distinguishes all other products bearing the G.E. monogram,' and that certain of the products would function with 'a precision unequaled in this type of equipment,' etc.

"And in Madison Kipp Corp. v. Price Battery Corp. (1933) 311 Pa 22, 166 A 377, where an inquiry, leading to purchase, was prompted by an advertisement in a trade journal of the 'Madison-Kipp die-casting machine' and the advertisement was claimed to constitute an express warranty because of the statement that with such machine 'die-casting production is on a machine-toll basis, with the same economy, accuracy and high-speed production that distinguish modern machine-toll operation,' the court held that it was not an express warranty under a statute defining that term as any 'affirmation of fact' and recognizing that a 'statement purporting to be a statement of the seller's opinion only' could not be so classified, and further held that the statement was a mere expression of the vendor's opinion and did not aid to establish the plaintiff's claim, particularly where there was no showing that it was untrue. Similar views were expressed in F. M. Sibley Lumber Co. v. Schultz (1941) 297 Mich 206, 297 N. W. 243 (later appeal in (1944) 309 Mich. 193, 14 N. W. 2d 832), where language less positive as to the merits of plywood of a certain description, contained in the circular of a manufacturer, expressed by the representative of a lumber company making a sale of such material for use in erecting concrete forms was considered as embracing no express warranty, and fact findings that no implied warranty existed were approved.

"In Ralston Purina Co v. Iiams (1943) 143 Neb. 588, 10 N. W. 2d 452, where a stock food company advertised by radio and in newspaper publications that 300 pounds of hog feed which it manufactured would produce 100 pounds of pork, and a farmer

who heard the broadcast, and apparently upon the strength of the various advertising activities, went to the stock company's local dealer, who confirmed the statement, upon which purchase was made, the court took the view that a recovery upon the theory of fraud as for a breach of an express warranty could not be sustained, upon the theory that in order to establish an express warranty there must be something positive and unequivocal concerning the product sold upon which the vendee must be shown to have relied, and which is understood by the parties as an absolute assertion concerning the product, as distinguished from a mere expression of opinion, belief, judgment, or estimate, and considered that such statements amounted to dealer's talk, puffing, or praise of the seller's goods. There was a strong dissenting opinion, however, upon the theory and view of the evidence as a whole that the buyer's claim was supported by sufficient evidence that the radio advertisements sponsored by the company constituted a positive statement of fact, which was not only uncontradicted but confirmed by its agent, and that the natural effect was to cause the buyer to rely thereon, to his damage, in ordering a certain amount of such feed after estimating his needs according to the representation made. A similar construction of such language seems to have been taken in Ralston Purina Co. v. Cox (1942) 141 Neb. 432, 3 N. W. 2d 748.

The law in California which we suggested is applicable in this case is precisely to the same effect, and we quote from 43 Cal. Jur. 2d, Sales, Par. 106, as follows:

"*Statement of Opinion or Judgment.*—The seller of goods may not be held liable for erroneous state-

ments that were mere expressions of opinion and so understood by the parties. The law has long recognized that sellers of property, in their zeal to consummate sales, are prone to 'puff their wares,' and exaggerated statements of value are held to be mere expressions of opinion rather than material representations of existing facts, where the parties deal at arm's length. In this category are representations of future profits to be derived by the buyer from the property offered. The rule stated in the Uniform Sales Act is that no affirmation of the value of goods or any statement purporting to be only a statement of the seller's opinion is construed as a warranty."

II.

Did the Plaintiff or Her Mother Rely on Said Warranty?

(Answering brief of Appellee p. 21)

Our claim that there was no evidence of reliance is also brushed aside with a casual comment. Only two paragraphs are devoted to this most important consideration. Appellee does not refute the fact that the ads, Exhibits 8-25, *were never exhibited to plaintiff's mother at the trial and that she was never asked to identify them.* All she told is that she saw ads of Cara Nome products in various periodicals, that they were safe and dependable, and that she relied thereon. In a claim of express warranty it would seem indispensable that the exact language upon which Mrs. Nihil says she relied be identified. This was not done. A most important link in her proof of claimed reliance is absent.

If the warranty were to be extended regardless of the absence of privity, an exact identification of the words

relied on would be the minimum safeguard to be required to prevent spurious claims.

Of course, no amount of reliance on words used in advertising is sufficient when, in fact, the words used do not constitute a warranty.

We have discussed the effect of Exhibits 7 and 28 earlier. The exhibit which was in the carton and which was not seen until the carton was opened *could not have been an inducing factor in the purchase.* Inasmuch as the hand bill containing the "guarantee" which is claimed to have been seen before the purchase is identical in wording with the one found in the box, this point is of no consequence. The fact remains that the distinction between puffing and warranty applies with peculiar force to Exhibits 7 and 28. No "fact" as distinguished from "opinions" is stated or warranted there.

III.

Is There Necessity for Privity?

As far as California is concerned, the question stated in the heading must be answered in the affirmative. California has not yet dispensed with the necessity for privity except in the limited area of food and similar cases which was extensively discussed in *Burr v. Sherwin-Williams Co.,* 42 Cal. 2d 689, 268 P. 2d 1041.

With this recent case in California, and in view of the discussion in Point I of the opening brief of this appellant (pp. 17 and 18), the law laid down in *Burr v. Sherwin-Williams Co.,* should furnish the basis for decision in the present case. We submit that this Honorable Court is not helped with citations from Kentucky, Missouri, Washington, or Ohio. None of these are cosmetics cases. Moreover, in some of these cases the advertising

material was strikingly different from the advertising material in the case at bar, and in others the advertising material was not set out in the opinion. For instance, in *King v. Ohio Valley Termanix Co.* (Ky. 1948), 214 S. W. 2d 993, only the immediate retail seller was before the court. The question of privity is not discussed. An *implied* warranty was held to result from the following words:

> "Bruce Termanix insulation provides a complete chemical barrier throughout the under-structure and adjacent grounds. This blocks every possible approach of termites from their nests in the ground. Any termites that may remain in the wood above cannot get back to the earth for moisture and some die."

If the foregoing case is cited by the plaintiff for the purpose of showing that privity is no longer a requirement, the opinion does not touch on that problem. If the case is cited to show what may constitute an implied warranty, it *is not in point* because *only* an express warranty is involved in the case at bar.

In *Turner v. Central Airway Co.* (Mo. 1945), 186 S. W. 2d 603, the sale of a ladder by a retail store was involved. The warranty was made by the retailer to the ultimate user.

In *Turner v. Ford Motor Co.* (Wash. 1932), 35 P. 2d 1090, advertising material of the Ford Motor Company concerning shatter-proof glass was admitted against the company in spite of the lack of privity. That case, like *Rogers v. Toni Home Permanent,* 147 N. W. 2d 612, belongs to the very small group of cases which have dispensed with the privity requirement.

Rogers v. Toni Home Permanent, supra, was decided early in 1948. We have taken the trouble of checking all reported cases in 1948 and 1949 as far as referred to in the bound volumes of the National Digest System and we find that in the year and a half since *Rogers v. Toni Home Permanent,* that decision still stands practically alone.

Disregarding dangerous instrumentalities and food and bottled beverage cases, the following cases, all decided since *Rogers v. Toni Home Permanent, supra,* still adhere to the privity rule:

Young v. Aeroil Products, 248 F. 2d 185 (portable elevator);

Page v. Cameron Iron Works, 155 Fed. Supp. (airplane);

Albers Milling Co. v. Donaldson, 156 Fed. Supp. 683 (poultry feed);

Cooper v. Reynolds Tobacco Co., 158 Fed. Supp. 22 (Cigarettes);

Caplinger v. Werner, 311 S. W. 201 (boat explosion);

Zumpino v. Colgate Palmolive Co., 173 N. Y. S. 2d 117 (under-arm deodorant);

Zahn v. Ford Motor Co., 164 Fed. Supp. 936 (defective ashtray);

Ross v. Philip Morris, 164 Fed. Supp. 683 (Cigarettes);

Larson v. U. S. Rubber, 163 Fed. Supp. 327 (Rubber Boots);

Kaczonarkiewicz v. L. A. Williams Co., D. & C. 2d 14, 106 P. L. J. 1 (Stepladder).

Conclusion.

For all the foregoing reasons, as well as for the reasons set forth in Rexall's Opening Brief and in the briefs of appellant Lewis, we respectfully submit that the following answers are the correct and proper ones to give to appellee's questions:

1. That there was no express warranty.

2. That there was no competent evidence that plaintiff or her mother relied on the advertising, assuming, but not conceding, that it did constitute a warranty.

3. That the requirement of privity is still enforced in the majority of jurisdictions in spite of the views expressed in *Rogers v. Toni Home Permanent.*

For all the foregoing reasons it is respectfully urged that the judgment for the plaintiff herein be reversed with directions to enter a judgment for the defendant, Rexall Drug Company.

Respectfully submitted,

SPRAY, GOULD & BOWERS,

Attorneys for Appellant Rexall Drug Company.

No. 16,282

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,

Appellants,

vs.

SANDRA MAE NIHILL, a Minor, by Her Father and Guardian, JOHN NIHILL,

Appellee.

REPLY TO PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

No. 16,282

IN THE

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FOR THE NINTH CIRCUIT

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Appellants,

vs.

SANDRA MAE NIHILL, a Minor, by Her Father and Guardian, JOHN NIHILL,

Appellee.

REPLY TO PETITION FOR REHEARING.

Since the respondents on this petition for a rehearing stand in the same legal position, they join in this answer, rather than burden the court with two separate briefs.

Preliminarily it is submitted that no new material has been called to the attention of this court which was not *fully* explored in the prior briefs filed by both sides.

Appellee refuses to "face up" to the legal proposition long recognized in our courts, in *every jurisdiction,* that verdicts cannot rest upon *speculation, conjecture* and *surmise.*

The Supreme Court of the United States has had no difficulty in following this principle *through the years.*

Thus the Supreme Court of the United States, in affirming a ruling holding as a *matter of law,* that there was *no* liability in a negligence case, stated in *Moore Admr. v. Chesapeake & Ohio Ry. Co.,* 340 U. S. 573 at 578:

> "*Speculation* cannot supply the place of proof." (Emphasis added.)

In a very recent case the Supreme Court of the State of Washington in the case of *Bland v. King County* (Wash.), 342 P. 2d 599 (1959), was called upon to pass on the *identical point* decided by *this* court. The question was whether a certain injury had caused the death of decedent. The medical testimony was strikingly similar to the case at bar.

The court sets forth part of the testimony of one of the expert doctors as follows: (P. 600.)

> "In answer to a hypothetical question, Dr. Pace stated: Well, I think my opinion, as a matter of opinion, would be, that if a period of ten hours delay existed from the period of receipt of trauma and medical attention, I think there is a *very excellent possibility* of this being considered a trigger mechanism, or the initialing situation, *that might evolve* in the actual death itself. And to clarify that, I would say simply this, a period of delay and inattention to a condition like a fracture *we can assume the probability* that in a man of this nature that this *very probably could* cause a drop in blood pressure and that a drop of blood pressure prolonged over this period of time *could be a very excellent probable cause* of initiating the mechanism that resulted in his demise." (Emphasis ours.)

With respect to this testimony the court concluded as a *matter of law* that there was *no* causal connection shown between the decedent's death and his injuries, *which was sufficient to submit to a jury.*

The court stated at page 601;

"'It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death of impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury "might have," "may have," or "could have" cause, or "possibly did" cause the subsequent physical condition or death or that a given physical condition or death or that a given physical condition (or death) "might have," "may have" or "could have" resulted or "possibly did" result from a previous accident or injury—testimony, that is, which is confined to words indicating the possibility or chance of the existence of the causal relation in question and does not include words indicating the probability or likelihood of its existence.'

"In Anton v. Chicago, M. & St. P. R. Co., 92 Wash. 305, 159 Pac. 115, this court expressed its views with respect to such evidence, in the following language:

"'Taking the opinion of the witness [a medical man] for the appellant, as quoted above, at its full worth, we think it is no more than a statement of a possibility or possibly a probability, more or less remote, that the tuberculosis is a result of the injury. This is not enough. The law demands that verdicts

> rest upon testimony and not upon conjecture and speculation. There must be some proofs connecting the consequence with the cause relied upon. The testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on.' "

The same test was recently applied in *Sawyer v. Department of Labor and Industries,* 48 Wash. 2d 761, 766, 296 P. 2d 706 (1956).

Dr. Pace testified that the fractures *could* have produced a decrease in blood pressure, and that the decrease in blood pressure *could* have been a contributing cause of decedent's death. The doctor's testimony is, as we said of Dr. Benson's testimony in the *Sawyer* case, *supra* [p. 767], "assumption pyramided upon assumption, amounting to mere speculation and conjecture."

> "Applying the rule announced in the cited cases to the facts presently before us, we conclude that any finding by the jury that decedent's fall was a proximate cause of his death would be the result of speculation and conjecture, and that the court properly dismissed appellant's second cause of action."

It is submitted that *all* of the medical testimony in the case at bar, insofar as it relates to the issue of causation is of the same type as the testimony in the *Washington* case (*supra.*)

I.

There Is No Merit to the Suggestion That This Court Has Denied Plaintiff a Trial by Jury.

The Federal Rules expressly provide for orders which have the effect of declaring as a *matter of law,* that the evidence is insufficient to submit to a lay jury. The Rules expressly provide for judgments notwithstanding the verdict. The right to a trial by jury is a right long guaranteed, but this does *not* preclude a trial court or an appellate court from determining that plaintiff's proof has failed to meet *recognized legal standards.*

The Supreme Court has *many times* declared that as a *matter of law* no actionable negligence was shown.

See:

Moore Admr. v. Chesapeake & Ohio Ry. Co., 340 U. S. 573;

Brody v. Southern Ry. Co., 320 U. S. 476;

Eckenrode Admr. v. Pennsylvania Ry. Co., 335 U. S. 329 (No proximate cause shown as a matter of law.)

Petitioner has selected a handful of excerpts from the transcript which, rather than representing grounds for a rehearing, *fortify the decision of this court.*

Each and every one of these excerpts is subject to the same objection; they are either *meaningless* or fall squarely within the type of testimony that courts have uniformly *condemned* as having no probative value because they are speculative and conjectural.

For example: With reference to ammonium thioglycolate, C. E. P. Jeffers stated: "It has some toxicity. [Tr. p. 607; Pet. to Rehear. p. 2.] What possible relation existed between this testimony and the *cause* of the loss of appellee's hair is shrouded in speculation. Hundreds of commonly used preparations have "some degree" of toxicity like iodine, ammonia, etc., but cause no loss of hair.

Every doctor expressed an opinion, but as this court ably pointed out, their answers, insofar as the issue of causation was concerned, were speculative in *every instance.* Furthermore, this court will recall that ammonium thioglycolate is used in percentages varying from 3% to 20%; approximately 7% in the case at bar. APPELLEE'S COUNSEL IN NO INSTANCE EVER INCORPORATED IN ANY QUESTION POSED TO ANY OF HIS DOCTORS, THE PERCENTAGE OF THIOGLYCOLATE CONTAINED IN APPELLANT'S PRODUCT.

Dr. Martin's Testimony [pp. 314, 315, 316] falls squarely within the category of evidence that is *meaningless* and speculative. "Thus . . . this condition . . . *may well* have been due to a chemical irritant such as you mentioned . . ." (Pet. to Rehear. p. 3). Petitioner *omits* Dr. Martin's *qualifying* statements. He expressly stated: *"I have a qualified opinion"* [p. 314]. . . . "My opinion is that this loss of hair *may well* have been due to the home permanent, but certainly I do not feel it can be proved *for sure one way or the other."* [P. 314].

Dr. Melton's testimony (Pet. to Rehear. pp. 3 and 4) is likewise meaningless. Here again no *concentrates* were given to this doctor. He, at most, suggested that in *certain concentrations,* (not specified in either questions or

answers). . . . "It can be harmful in the sense that *other allergic* reactions can occur in concentrations that are used. Alopecia[1] *may* occur and toxic reactions have been reported." [pp. 336-337]. Even here it is interesting to note that as to the so called toxic reactions "there have been controversial studies or reports as to their exact nature." What possible probative value could this evidence have to any lay jury?

Dr. Levitt's testimony has been carefully analyzed by this court. Almost every piece of testimony mentioned by petitioner was cited to this court in the *original briefs* of the parties or was mentioned by this court in its opinion.

When all of the testimony is examined, one thing stands out predominantly: There was an *utter absence of any proof* indicating that the preparation in question was anything other than an ordinary home permanent wave solution, manufactured in accordance with the usual practice in the industry. There was not one scintilla of evidence to support the conclusion that there was any *causal* relationship between the particular product and the alleged loss of hair.

Dr. Levitt, to put it plainly, stated that "a" coldwave permanent *"could* have caused the original loss of hair." [P. 357]. He did not refer to a "home permanent" or a permanent with any *particular strength of solution of thioglycolate.* This doctor conceded that selsum, the prescription drug (obviously a chemical) applied to the appellee's head for *months* without supervision of *any sort,* had been reported in a few cases *as causing a loss of hair.*

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[1]He, nowhere in this answer refers to alopecic *totalis,* but rather to simple alopecia; *i.e.,* patchy loss of hair.

[P. 359]. His testimony was to the effect that in 25% of the cases alopecia areata was caused by *sudden* shock, and in the other 75% of the cases the cause was *unknown*. [Pp. 362-363.] The record is *absolutely devoid* of any evidence of sudden shock to the plaintiff. Even the hair loss was *not* sudden but took five to six months during *all* of which time appellee was applying a prescription drug and admittedly, according to Dr. Levitt, had *all* the ordinary symptoms of a thyroid gland *case,* which will *cause* loss of hair.

The possibility that the shock from the prospect of a basketball tournament would cause an alopecia was just as much a possible cause as anything else. [P. 364.]

II.

This Court Has Correctly Applied the Applicable Law.

It is urged that this court has failed to apply the law of *North Dakota,* citing *Burt v. Lake Region Flying Service,* 54 N. W. 2d 339. This case was discussed by *both* parties in the briefs already before this court.

Petitioner has *overlooked fundamental principles.* This court, in a diversity case, will look to North Dakota for the *substantive law,* but not for the *procedural law.*

The effect of evidence, the matter of inferences, presumptions, burden of proof and related matters *must* be determined by the law of the *forum,* to wit: California, and this court has unerringly set forth the *applicable* principles as they have been applied by the California courts and the petitioner *does not* claim to the contrary and *no* California authority is cited by petitioner contrary to the authorities relied upon by this court.

While the weight of evidence is for the trier of *fact,* it is always proper to refuse to submit a cause to a jury

where there is no evidence to submit to them *which is capable of being weighed.*

The two *North Dakota* cases cited by petitioner are clearly *not* in point in any event. The *Burt* case (*supra*) has already been discussed. The case of *Bergley v. Manns,* 99 N. W. 2d 849, is not in point. This was a typical *res ipsa loquitur* case, a *classical* case in fact, where a false front on a building collapsed, injuring the plaintiff. The court merely holds that the doctrine *res ipsa loquitur* was applicable. This is in clear accord with many similar California cases, but is wholly *unlike* the case at bar for the reasons heretofore pointed out in the opening brief of appellant Lewis. Clearly *no res ipsa loquitur* case was made out against *Lewis* for the reasons pointed out and no case was made out against Rexall for the reason that as this court has said, there was *no* proof of causal relationship between the product and the hair loss.

III.

The Contention That Full Faith and Credit Was Not Given to the Testimony of Certain Witnesses from North Dakota Is Without Merit.

No authority is cited by petitioner for this unique proposition.

Article IV, Section 1 of the Constitution of the United States provides:

> "Full Faith and Credit shall be given in each state to the *public acts, records and judicial proceedings* of every other state. . . ."

It is asserted that this court has referred to give "Full Faith and credit" to the testimony of the Carlsons given originally by deposit on in North Dakota. It is difficult

to understand petitioner's position in this connection. The depositions were given by citizens of North Dakota in *this* Federal Court proceeding. *There is no problem of "full faith and credit" involved.*

This court as well as the trial court was of the opinion, and it is submitted correctly so, that these depositions were inadmissible. Proper and full objections were made at the time of their introduction in evidence. The depositions could shed no possible light on this lawsuit, for the many reasons pointed out in the trial court and by this court in its opinion.

Conclusion.

It is respectfully submitted that the petition to rehear is without merit; raises no new points and should be denied.

Respectfully submitted,

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No. 16282

United States

Court of Appeals

for the Ninth Circuit

REXALL DRUG COMPANY, a Corporation, and ARNOLD L. LEWIS, Doing Business as Studio Cosmetics Company, Appellants,

vs.

SANDRA MAE NIHILL, a Minor, by Her Father and Guardian John Nihill, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 408, inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—4-2-59

No. 16282

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the District of the State of California, Central Division

No. 258-57 WM

SANDRA MAE NIHILL, a Minor, by Her Father and Regular Guardian, John Nihill,
Plaintiff,

vs.

REXALL DRUG COMPANY, a Corporation, Doing Business as Cara Nome Rexall, and ARNOLD L. LEWIS, Doing Business as Studio Cosmetics Company, Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff for Right of Action Alleges:

I.

That she is a minor of the age of fifteen years, a resident citizen of the State of North Dakota, and brings this action through her father and regular guardian, John Nihill, a resident citizen of the State of North Dakota, duly qualified as regular guardian of the plaintiff on May 28, 1956, through the County Court of Foster County, North Dakota, and certified copy of Letters of Guardianship is attached hereto and made a part hereof, designated as Exhibit "A"; the defendant, Rexall Drug Company, is a corporation, organized and existing under the laws of the State of Delaware and doing business in the State of California under the name, Cara Nome Rexall, a fictitious name; and the de-

fendant, Arnold L. Lewis, is doing business under the name, Studio Cosmetics Company, and is presently a citizen and resident of California doing business at Los Angeles, California; that the amount involved herein is more than $3,000.00, exclusive of costs; that party plaintiff is a resident citizen of a different state from parties defendant.

II.

That defendant, Rexall Drug Company, doing business as Cara Nome Rexall, [2] was the distributor of said product in association with the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company; that Arnold L. Lewis, doing business as Studio Cosmetics Company, was the manufacturer of said product; and as such manufacturer and distributor, defendants advertised, sold and distributed said product throughout the United States and Canada, including North Dakota.

III.

That on the 5th day of February, 1955, plaintiff purchased from the Kensal Drug Company of Kensal, North Dakota, a bottle of said product of Cara Nome, which had been obtained from and through the defendants; this product, when so purchased, was sealed and was a product that had come from the factory in the state in which it was at the time of purchase; this product was immediately taken to the home of plaintiff and there opened and immediately used pursuant to directions accompanying said product; that within ten days after said use, plaintiff's hair began coming out and continued

to do so until in a short while all was gone, and she was rendered hairless on the head and has ever since been bald and will always be so disfigured.

IV.

That said product and the application thereof as aforesaid was the direct and proximate cause of the loss of hair as aforesaid by plaintiff; that defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, the manufacturer, was guilty of negligence in permitting some ingredient to be placed in said bottle that could result in the loss of hair as aforesaid of plaintiff or guilty of some negligence in the mixture of said ingredients in said bottle, and was negligent in advertising and selling to the public, and particularly to the plaintiff, said product with its unsafe and dangerous ingredients or mixture; that defendant, Rexall Drug Company, doing business as Cara Nome Rexall, was negligent in distributing this product without proper safeguards concerning its use, and advertising and selling to the public this product without warning concerning its [3] dangerous ingredients and in joining with the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, in the combined operation of manufacturing and sale under their name for a common purpose.

V.

That said product was advertised and sold as a product safe and suited to be used for the purposes for which it was used, as a home permanent waver or curler for the hair; that it was represented by

defendants to be non-injurious to the hair and safe for the purposes for which it was sold and purchased; that plaintiff relied upon said representations and upon the strength of said representations used said product as aforesaid and suffered the ill effects of the use of same as aforesaid.

VI.

That as the result of the use and application of said product plaintiff has been disfigured for life, made bald, subjected to humiliation and embarrassment and caused mental anguish, and will continue to suffer from baldness, humiliation, embarrassment, mental anguish and all the naturally attendant incapacities socially and economically; that she has incurred expenses of medical clinics, doctors, specialists, medicines and other treatments in the endeavor to be cured and to be restored to the status of a girl with hair.

Plaintiff Demands a Jury Trial.

Wherefore, plaintiff demands judgment in the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00), together with costs and disbursements herein.

Dated this 4th day of February, 1957.

/s/ JAMES G. ROURKE,
LANIER, LANIER & KNOX,

/s/ By P. W. LANIER, JR.,
A Member of the Firm,
Attorneys for Plaintiff. [4]

EXHIBIT "A"

LETTERS OF GUARDIANSHIP

State of North Dakota
County of Foster—ss.

In the County Court, before Hon. M. P. Roberts, Judge.

In the Matter of the Guardianship of Sandra Nihill, Minor.

John Nihill, Petitioner, vs. Sandra Nihill, Respondent.

State of North Dakota
County of Foster—ss.

The State of North Dakota, to all to whom these presents shall come or may concern.

Whereas, John Nihill was duly appointed Guardian of the person and estate of Sandra Nihill, minor child of Petitioner of McKinnon Township in the County of Foster in the State of North Dakota, by the order of the County Court of said County of date the 28th day of May, 1956, and has duly qualified accordingly.

Now, Therefore, Know ye, that he the said John Nihill is authorized to enter upon the discharge of his duties as such guardian and continue therein until the revocation of these letters.

In Witness Whereof, the signature of the Judge of said Court is hereto subscribed and attested by

the seal of said Court in the City of Carrington in said County of Foster and State of North Dakota, this 28th day of May, 1956.

By the Court:

/s/ M. P. ROBERTS,
Judge of the County Court.

State of North Dakota
County of Foster—ss.

John Nihill, being first duly sworn does depose and say that he will support the Constitution of the United States and the Constitution of the State of North Dakota and that he will faithfully and according to law to the best of his ability perform all of the duties of his trust as Guardian of the above named Sandra Nihill, minor, to which trust he has been duly appointed by the above-named Court.

/s/ JOHN NIHILL,

Subscribed and sworn to before me this 28th day of May, 1956.

[Seal] /s/ T. A. RONEY,

Notary Public, Foster County, N. Dak. My commission expires Dec. 4, 1959. [5]

Certificate of Certification Attached. [6]

[Endorsed]: Filed February 19, 1957.

United States District Court for the Southern District of California, Central Division

Civil Action File No. 258-57 WM

SANDRA MAE NIHILL, a Minor, by her Father and Regular Guardian, JOHN NIHILL,
Plaintiff,

vs.

REXALL DRUG COMPANY, a Corporation, Doing Business as CARA NOME REXALL, and ARNOLD L. LEWIS, Doing Business as STUDIO COSMETICS COMPANY,
Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon James G. Rourke, plaintiff's attorney, whose address is First Western Bank Building, Santa Ana, California, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: February 19, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk of Court,

/s/ IRWIN YOUNG,
Deputy Clerk. [7]

Return on Service of Writ
United States of America
Southern District of California—ss.

I hereby certify and return that I served the annexed summons on the therein-named Arnold L. Lewis by handing to and leaving a true and correct copy thereof, together with a copy of the complaint, with deft's wife, Ethel Lewis, a person of suitable age and discretion now residing at the dwelling house and usual place of abode of the above-named defendant at 834 Thayer Ave., W. L. A., Calif., in said District, on the 23rd day of Feb., 1957.

ROBERT W. WARE,
U. S. Marshal,

/s/ By R. J. VALENCIA,
Deputy.

Fee:	$2.00
Mileage @ 10c mi.	$2.80
Total:	$4.80 [8]

Return on Service of Writ
United States of America
Southern District of California—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Rexall Drug Company & Corp., together with a copy of the complaint, by handing to and leaving a true and correct copy thereof with Theodore Sirene, Agent, personally at 510 So. Spring St. at Los Angeles,

Calif., in the said District at 3 p.m., on the 25th day of Feb., 1957.

R. W. WARE,
United States Marshal,

/s/ By JOHN E. SEARS,
Deputy.

Marshal's fees	$2.00
Mileage: 2 at 10c	.20
	$2.20 [9]

[Endorsed]: Filed February 27, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff for Right of Action Alleges:

Cause of Action No. One

I.

That she is a minor of the age of fifteen years, a resident citizen of the State of North Dakota, and brings this action through her father and regular guardian, John Nihill, a resident citizen of the State of North Dakota, duly qualified as regular guardian of the plaintiff on May 28, 1956, through the County Court of Foster County, North Dakota, and certified copy of Letters of Guardianship is attached hereto and made a part hereof, designated as Exhibit "A"; the defendant, Rexall Drug Company, is a corporation, organized and existing un-

der the laws of the State of Delaware and doing business in the State of California under the name, Cara Nome Rexall, a fictitious name; and the defendant, Arnold L. Lewis, is doing business under the name, Studio Cosmetics Company, and is presently a citizen and resident of California doing business at Los Angeles, California; that the amount involved herein is more than $3,000.00, exclusive of costs; that party plaintiff is a resident citizen of a different state from parties defendant. [10]

II.

That defendant, Rexall Drug Company, doing business as Cara Nome Rexall, was the distributor of said product in association with the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company; that Arnold L. Lewis, doing business as Studio Cosmetics Company, was the manufacturer of said product; and as such manufacturer and distributor, defendants advertised, sold and distributed said product throughout the United States and Canada, including North Dakota.

III.

That on the 5th day of February, 1955, plaintiff purchased from the Kensal Drug Company of Kensal, North Dakota, a bottle of said product of Cara Nome, which had been obtained from and through defendants; this product, when so purchased, was sealed and was a product that had come from the factory in the state in which it was at the time of purchase; this product was immediately taken to

the home of plaintiff and there opened and immediately used pursuant to directions accompanying said product; that within ten days after said use, plaintiff's hair began coming out and continued to do so until in a short while all was gone, and she was rendered hairless on the head and has ever since been bald and will always be so disfigured.

IV.

That said product and the application thereof as aforesaid was the direct and proximate cause of the loss of hair as aforesaid by plaintiff; that defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, the manufacturer, was guilty of negligence in permitting some ingredient to be placed in said bottle that could result in the loss of hair as aforesaid of plaintiff or guilty of some negligence in the mixture of said ingredients in said bottle, and was negligent in advertising and selling to the public, and particularly to the plaintiff, said product with its unsafe and dangerous ingredients or mixture; that defendant, Rexall Drug Company, doing business as Cara Nome Rexall, was negligent in distributing [11] this product without proper safeguards concerning its use, and advertising and selling to the public this product without warning concerning its dangerous ingredients and in joining with the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, in the combined operation of manufacturing and sale under their name for a common purpose.

Cause of Action No. Two

I.

That said product was advertised and sold as a product safe and suited to be used for the purposes for which it was used, as a home permanent waver or curler for the hair; that it was represented by defendants to be non-injurious to the hair and safe for the purposes for which it was sold and purchased; that plaintiff relied upon said representations and upon the strength of said representations used said product as aforesaid and suffered the ill effects of the use of same as aforesaid.

II.

That as the result of the use and application of said product, plaintiff has been disfigured for life, made bald, subjected to humiliation and embarrassment and caused mental anguish, and will continue to suffer from baldness, humiliation, embarrassment, mental anguish and all the naturally attendant incapacities socially and economically; that she has incurred expenses of medical clinics, doctors, specialists, medicines and other treatments in the endeavor to be cured and to be restored to the status of a girl with hair.

Plaintiff Demands a Jury Trial.

Wherefore, Plaintiff demands judgment in the amount of Two Hundred and Fifty Thousand Dollars ($250,000) together with costs and disbursements herein.

Dated this 18th day of March, 1957.

/s/ JAMES G. ROURKE,
Attorney for Plaintiff,
LANIER, LANIER & KNOX,
/s/ By P. W. LANIER SR.,
A Member of the Firm,
Attorneys for Plaintiff. [12]

[Note: Exhibit "A"—Letters of Guardianship is the same as attached to Complaint at page 7.]

Affidavit of Service by Mail Attached. [14]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and answering plaintiff's complaint on file herein, admit, deny and allege as follows:

Cause of Action No. One

I.

Answering paragraph III thereof, these answering defendants have no information or belief sufficient to enable them to answer the allegations contained therein, and basing their answer on said ground, deny generally and specifically each and every allegation contained therein and the whole thereof. [15]

II.

Answering paragraph IV thereof these answering defendants deny generally and specifically each and every allegation contained therein and the whole thereof.

Cause of Action No. Two

I.

Answering paragraph I thereof, these answering defendants deny generally and specifically each and every allegation contained therein and the whole thereof.

II.

Answering paragraph II thereof, these answering defendants deny generally and specifically each and every allegation contained therein and the whole thereof.

As and for a Separate and Distinct Affirmative Defense These Answering Defendants Allege as Follows:

I.

That the injuries, damages and loss, if any, sustained by the plaintiff herein, were proximately caused and contributed to by the negligence on the part of the plaintiff in that she did not exercise ordinary care on her own behalf at the time and place referred to in said Amended Complaint.

For a Second, Separate and Distinct Affirmative Defense These Answering Defendants Allege as Follows:

I.

That whatever injury or damage, if any, was suffered by the plaintiff, whether as alleged or otherwise, the same was a direct and proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to all times as mentioned in plaintiff's Amended Complaint on file herein. [16]

For a Third, Separate and Distinct Affirmative Defense These Answering Defendants Allege as Follows:

I.

That plaintiff is barred from maintaining an action herein and these answering defendants are not liable herein for any alleged breach by reason of the failure of plaintiff to give notice within a reasonable time of this breach.

Defendants Demand a Jury Trial.

Wherefore, these answering defendants pray that plaintiff take nothing by reason of the Amended Complaint on file herein, for cost of suit herein incurred, and for such other and further relief as to the Court seems just and proper in the premises.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By FREDERICK P. BACKER,
Attorneys for Defendants. [17]

Affidavit of Service by Mail Attached. [18]
Duly Verified.

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES

Comes the plaintiff and requests of the defendants that the following interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure, be answered under oath by any of your officers or agents competent to testify in your behalf who know the facts about which inquiry is made, and that the answers be served on plaintiff within 15 days from the date these interrogatories are served upon you. [19]

* * * * *

[Note: Interrogatories are included in the Answers at pages 18-25.]

LANIER, LANIER & KNOX,
/s/ By P. W. LANIER, SR.,
A Member of the Firm,
/s/ JAMES G. ROURKE,
Attorneys for Plaintiff. [23]

Affidavit of Service by Mail Attached. [24]

[Endorsed]: Filed June 5, 1957.

[Title of District Court and Cause.]

ANSWERS TO PLAINTIFF'S INTERROGATORIES

State of California
County of Los Angeles—ss.

Comes now the defendant Arnold L. Lewis doing business as Studio Cosmetic Company and in an-

swer to plaintiff's interrogatories in the captioned case and being first duly sworn answers the questions as follows:

No. I. Do you:

(a) Specifically admit paragraphs I and II of Amended Complaint? [33]

(b) If not, what allegations of said paragraphs are denied?

Answer: Defendant Arnold L. Lewis admits that he is doing business under the name of Studio Cosmetic Company and is presently a citizen and resident of the State of California and engaged in business in the City of Los Angeles, County of Los Angeles, State of California. This defendant has no personal knowledge of any of the remaining allegations in said paragraph and basing his denial on that ground denies all of the remaining allegations of said paragraph.

No. II. (a) Under the laws of what state is Rexall Drug Company, a corporation, organized?

Answer: Being answered in a separate document by Rexall Drug Company.

(b) Of what state is defendant, Arnold L. Lewis, a resident?

Answer: Defendant Arnold L. Lewis admits that he is a resident of the County of Los Angeles, State of California.

No. III. In the first defense set up in defendants' answer you claim plaintiff's negligence contributed to her alleged injury—state in what way she could use this product, Cara Nome, so as to cause the alleged injury?

Answer: The misuse of the product and by not following the proper directions set forth in each package could cause breakage of the hair by reason of the solution remaining on the hair too long or because the neutralization was not properly done in accordance with the instructions. Another cause of hair breakage would be the possible use by the plaintiff of some other product such as a bleach or peroxide which could have weakened the hair or a shampoo that might have had a very strong detergent action prior to the use of the permanent wave product.

No. IV. What are the ingredients, chemical or otherwise, in Cara Nome? [34]

Answer: The ingredients used in the Cara Nome permanent wave are common chemicals used in virtually all permanent wave preparations on the market, namely, ammonium thioglycolate, distilled water and aqua ammonia C.P.

No. V. In what proportions are such ingredients placed in a bottle of the size alleged to have been sold to plaintiff herein?

Answer: Ammonium thioglycolate — 5%; aqua ammonia C.P.—.75%; distilled water—94.25%.

The above percentages of ingredients are used in the preparation of the Cara Nome home permanent wave.

No. VI. If your answer to the foregoing question is that you don't know because you have not seen the bottle, if you are shown the alleged bottle would you be able to say:

(a) Whether or not you manufactured a product sold in such a bottle?

Answer: If shown the bottle I would be able to state whether or not that bottle was actually filled with our product.

(b) What the ingredients therein are?

Answer: The ingredients would be as heretofore stated.

(c) Are the ingredients in the same proportion in all such products?

Answer: Virtually the same.

No. VII. Is any one or more such ingredients used alone or in too great quantity harmful to hair or scalp?

Answer: Never had occasion to make the test to determine. To my knowledge any one of ingredients is never used alone.

No. VIII. Are the ingredients in Cara Nome

(a) Mixed and bottled under supervision of a graduate chemist?

Answer: Yes.

(b) And, if so, give name or names of such [35] chemists and their addresses.

Answer: Chemist no longer in our employ*ee*. Do not recall at this time the name and address of chemist.

No. IX. Are you able to say as to Cara Nome sold at the time of alleged sale to plaintiff by Kensal Drug Company of Kensal, North Dakota?

Answer: Cannot say.

(a) Through what companies, distributors or persons it went from the time it was manufactured until it reached Kensal Drug Company?

Answer: I do not know.

(b) If your answer is yes, trace the course of said product through such companies, distributors or persons?

Answer: Cannot answer.

No. X. Are the bottles of Cara Nome:

(a) Sealed and air tight at time of manufacture?

Answer: Yes.

(b) Would opening or unsealing of said bottle bring about a chemical or any change in the product that would result in injury from its use.

Answer: I do not know.

No. XI. (a) Has the product, Cara Nome, been submitted to specialists in the medical profession on hair and scalp, together with the list of ingredients and proportions used to determine what effects would be on hair and scalp?

Answer: No.

(b) If so, give name or names of such specialists and their addresses.

Answer: ——

No. XII. (a) If experts or specialists as referred to in the foregoing question gave written opinions, will you produce same for examination and use on the trial or at the pretrial conference if [36] such is held?

Answer: ——

(b) If such opinions were oral what, in substance, were they?

Answer: ——

No. XIII. (a) When did you begin the manufacture and distribution of Cara Nome?

Answer: Approximately 1950.

(b) What changes, if any, have been made since in this product?

Answer: None.

(c) Why were such changes made?

Answer: ——

(d) Upon whose advice were such changes made?

Answer: ——

No. XIV. (a) Did defendant, Rexall Drug Company, before engaging in the distribution of said product, familiarize itself with the ingredients in said product?

Answer: Being answered in a separate document by Rexall Drug Company.

(b) Did the owner thereof, Arnold L. Lewis, so familiarize himself with the ingredients in said product and the proportionate mixture of such ingredients in same?

Answer: Yes.

No. XV. (a) (b) (c) Being answered in a separate document by Rexall Drug Company.

No. XVI. Being answered in a separate document by Rexall Drug Company.

No. XVII. Is any other company or organization

(a) Authorized to manufacture said product?

Answer: No.

(b) If your answer is yes, give name and address [37] of such company or organization.

Answer: ——

No. XVIII. In paragraph I of the second affirmative defense in the Answer served herein, it is said that whatever injury or damage was suffered by plaintiff was a direct, proximate and sole result of

plaintiff's physical and bodily condition and constitutional composition prior and subsequent to all times mentioned in plaintiff's Amended Complaint.

(a) What bodily condition and constitutional composition prior to the use of said product alleged to have caused the loss of hair by the use thereof could be such cause of such loss of hair by plaintiff?

Answer: Various.

(b) What bodily condition and constitutional composition subsequent to the use of said product could cause the loss of hair as alleged by plaintiff?

Answer: Various.

(c) On the bottle of said product alleged to have been sold to plaintiff or any bottle manufactured and distributed by defendants, or any box, pamphlet, instructions or directions accompanying such product when sold to the purchaser, did you warn against the use of same by one of such bodily and physical condition and constitutional composition?

Answer: Up to the present time the exact body and physical conditions and constitutional composition of the plaintiff are unknown, but instructions contained in said product set forth the manner in which it should be used and conditions under which is should be used.

(d) Are we to understand that at the time of the manufacture and sale of such product you were aware that certain persons with certain physical compositions, constitutional and physical, could and would suffer such results as alleged by plaintiff [38] that she suffered from the use of said product?

Answer: No.

(e) If you describe the physical bodily condition and constitutional composition of a person who could and would suffer the results from the use of said product, alleged by plaintiff to have been suffered from the use of same, from what authority did you get your information, giving names and addresses?

Answer: ——

Nos. XIX, XX, XXI and XXII. Being answered in a separate document by Rexall Drug Company.

/s/ ARNOLD L. LEWIS.

Subscribed and sworn to before me this 26th day of August, 1957.

[Seal] /s/ MARGUERITE L. MAIRE,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires December 19, 1958. [39]

Affidavit of Service by Mail Attached. [40]

[Endorsed]: Filed August 27, 1957.

[Title of District Court and Cause.]

ANSWERS TO PLAINTIFF'S INTERROGATORIES

State of California
County of Los Angeles—ss.

Comes now the defendant Thomas H. Stark, Assistant Manager Insurance and Tax, in charge of all claims for defendant Rexall Drug Company, a corporation, and in answer to plaintiff's interroga-

tories in the captioned case and being first duly sworn answers the questions as follows:

Nos. I (a) (b), II (b), III, IV, V, VI (a) (b) (c), VII, VIII (a) (b), IX (a) (b), X (a) (b), XI (a) (b), XII (a) (b), XIII (a) (b) (c) (d), [41] XIV (b), XVII (a) (b), and XVIII (a) (b) (c) (d) (e) being answered in a separate document by Arnold L. Lewis.

No. II. (a) Under the laws of what state is Rexall Drug Company, a corporation, organized?

Answer: Delaware.

No. XIV. (a) Did defendant, Rexall Drug Company, before engaging in the distribution of said product, familiarize itself with the ingredients in said product?

Answer: Yes.

No. XV. (a) When did Rexall Drug Company become distributor of said product?

Answer: April 1953.

(b) And for what territory?

Answer: Nationwide.

(c) If there is a written contract between defendant manufacturer and defendant distributor, will you produce same on the trial for examination and use, or at the pretrial conference if same is held?

Answer: Written contract is a purchase order contract; Rexall Drug Company is willing to produce copy of form of purchase order used.

No. XVI. (a) Is Arnold L. Lewis, doing business as Studio Cosmetic Company, a director, officer or agent of the defendant, Rexall Drug Company?

Answer: No.

(b) If so, what is this connection?

Answer: ——

No. XIX. Does the defendant have in its custody or control the original of the letter dated July 5, 1955, from T. A. Roney to Rexall Drug Company, Department F 8480, Beverly Blvd., Los Angeles 54, California, re Sandra Nihill?

Answer: No. [42]

No. XX. If the answer to the above question is no, does the defendant, Rexall Drug Company, admit receiving such letter?

Answer: No.

No. XXI. Was the defendant, Arnold L. Lewis, notified by the defendant, Rexall Drug Company, of the receipt of this letter?

Answer: No.

No. XXII. If the answer to the foregoing question is yes, will the defendant produce the original of this letter at the meeting of the attorneys on the trial or at the pretrial conference for examination or copying?

Answer: ——

/s/ THOMAS H. STARK.

Subscribed and sworn to before me this 14th day of August, 1957.

[Seal] /s/ NORMA N. KING,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires June 18, 1961. [43]

Affidavit of Service by Mail Attached. [44]

[Endorsed]: Filed August 27, 1957.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered:

I.

This is an action for damages based on two counts, negligence and breach of warranty; the pleadings consist of a complaint and a joint answer of both defendants; the plaintiff is a minor suing through her general guardian, her father, John Nihill; the defendant Rexall Drug Company is a Delaware corporation, authorized to do business in the State of California; the defendant Arnold L. Lewis is an individual doing business under the fictitious firm name and style of Studio Cosmetics Company. [45]

II.

Federal jurisdiction is invoked upon diversity of citizenship of the plaintiff and both parties defendant, and is brought for an amount in excess of $3,000.00, exclusive of costs.

III.

Admitted facts are as follows:

1. The plaintiff is a minor, suing through her general guardian, her father John Nihill.

2. The defendant Rexall Drug Company, a corporation, is a Delaware corporation, authorized to do business in the State of California.

3. The defendant Arnold L. Lewis is an individual doing business under the fictitious firm name and style of Studio Cosmetics Company, and resident of California.

4. The defendant Arnold L. Lewis is the manufacturer of a product known and sold as Cara Nome Natural Curl Brand Pin Curl Permanent.

5. The defendant Rexall Drug Company is the national distributor of said product under purchase order introduced as Exhibit .... Said defendant Rexall Drug Company did not participate in the preparation or manufacture of the product but purchased and sold said product in sealed containers as received from defendant Arnold L. Lewis doing business as Studio Cosmetics Company.

6. Said product is sold nation-wide, including the State of North Dakota.

7. It is agreed that there was a complete sheet of instructions for application of the solution and neutralizer, prepared by the manufacturer, included in the Cara Nome Natural Curl Brand Pin Curl Permanent kit purchased by the plaintiff.

These admissions of fact were true at all times material herein. [46]

IV.

There are no reservations as to the facts stated in Paragraph III.

V.

The following issues of fact, and no others, remain to be litigated upon the trial:

1. Whether or not the defendants manufactured

or sold a product containing chemicals in quantities that were or should have been known to be inherently dangerous for human use.

2. Whether or not the defendants negligently failed to warn the public of the contents of the solution and neutralizer and what their chemical effects could or could not be.

3. Whether or not the chemicals used were in dangerous proportion to the entire solution.

4. Whether or not the particular batch of solution, from which came the purchase by this plaintiff and others in her area of the country, was an unusually strong solution and particularly dangerous to hair and scalp, and whether or not the product caused damage to the hair of this plaintiff, or others.

5. Whether or not said solution manufactured or sold by these defendants did actually damage the hair of the plaintiff.

6. Whether or not there was proper warning as to the use of their product in the directions accompanying the solution and the kit.

7. Whether or not the defendants negligently failed to properly test said solution.

8. Whether or not the defendants had knowledge of any dangers which the users of their product would not ordinarily discover.

9. Whether or not the plaintiff followed the directions as contained in the kit.

10. Whether or not this plaintiff was physically so [47] constituted as to be peculiarly allergic to the product.

11. Whether or not the loss of hair of the plaintiff is permanent.

12. Whether or not the product was reasonably fit for the purpose for which it was intended.

13. Whether or not timely notice was given to the defendants by plaintiff.

VI.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

Plaintiff

1. The pictures of the plaintiff immediately prior to loss of her hair.

The defense will object to plaintiff's photograph allegedly depicting the plaintiff immediately preceding the use of the product on the ground that the picture was taken too long before the alleged loss of hair.

2. Pictures of the plaintiff after loss of hair.

3. The bottle which contained the hair wave solution actually involved herein.

The defense will object to the foundation for introducing said bottle in evidence and its materiality.

4. Another Cara Nome Natural Curl Brand Pin Curl Permanent kit of identical kind used by the plaintiff, said kit being purchased from the same Rexall Drug Store at about the same period of time as plaintiff's purchase, and bearing the same batch number, 181.

Defense will object to the foundation for the

introduction of said kit in evidence and its materiality.

5. Report of biochemist from his analysis and break-down of said Cara Nome Natural Curl Brand Pin Curl Permanent kit listed [48] in number 4 above.

Defense will object to the qualifications of the biochemist and the materiality of his evidence.

6. Portions of plaintiff's hair and braids prior to the application of the wave solution, together with portions of plaintiff's hair which fell out after the application of the wave solution.

Defense reserves objections.

7. A series of directions for application of other home cold wave kits such as Toni, including the warnings contained therein.

Defense will object on the ground that it is immaterial insofar as the use of the subject product is concerned.

Defendants

1. Kit of Cara Nome Natural Curl Brand Pin Curl Permanent as offered for sale by defendants at about the period of time of plaintiff's alleged purchase and expert testimony regarding the kit.

Plaintiff will make no objection to the introduction of a similar kit for the purpose of showing the mechanical unit contents of that kit, but will reserve right to objection as to foundation and materiality of the chemical contents of the solution and neutralizer of the kit, unless shown that it is from the same batch as that used by the plaintiff and unless shown that the directions contained

therein are the same directions contained in the kit purchased by the plaintiff.

VII.

The following issues of law, and no others, remain to be litigated upon the trial.

1. Whether or not the doctrine of Res Ipsa Loquitur applies.

2. Whether or not under the statutes and decisions of [49] North Dakota this is a case that falls within the confines of the implied warranty statute.

3. Whether or not any allergy is a defense to this action.

4. Whether or not the negligence of the defendants, if any, is a proximate cause of this injury.

5. Whether or not plaintiff failed to exercise ordinary care on her own behalf at the time and place the product of the defendants was used, as alleged by plaintiff.

6. Whether or not the injury and/or damage, if any, suffered by plaintiff was a direct and proximate and sole result of plaintiff's physical and bodily and constitutional composition at the times mentioned in plaintiff's amended complaint.

It is agreed between counsel that the substantive law of North Dakota applies in this action.

VIII.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be

litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated:

.....

Judge of the U. S. District Court.

Approved as to Form and Content:

LANIER, LANIER & KNOX,
/s/ P. W. LANIER JR.,
Attorneys for Plaintiff.

SPRAY, GOULD & BOWERS,
/s/ By MALCOLM ARCHBALD,
Attorneys for Defendant Rexall Drug Company.

REED, CALLAWAY, KIRTLAND AND PACKARD,
/s/ By FREDERICK P. BACKER,
Attorneys for Defendant Arnold L. Lewis. [50]

[Title of District Court and Cause.]

SEPARATE ANSWER OF REXALL DRUG COMPANY TO AMENDED COMPLAINT

Comes now the defendant, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and after permission of Court first had and obtained separating itself from all other defendants in the above cause, files this its separate answer to plaintiff's amended complaint:

I.

Admits each and every allegation contained in Paragraph I of the first cause of action of plaintiff's amended complaint and further admits that at and prior to the times mentioned in the complaint defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, was engaged in the manufacture of the product mentioned in the complaint and that this answering defendant purchased said product from Arnold L. Lewis and distributed, sold [51] and advertised said product for the purpose of sale throughout the United States and Canada including North Dakota and further alleges that during all times, said product was handled by this answering defendant by purchase from the manufacturer or by sale to retail customers, or otherwise, that said product was sealed and in the same state in which it was received from the factory at the time of sale of said product to retailers.

II.

For lack of knowledge, information and belief sufficient to enable it to answer in respect thereto, and basing its denial upon such ground, denies each and every allegation contained in Paragraph III of the first cause of action of plaintiff's amended complaint except that this answering defendant admits that if plaintiff did purchase a bottle of said product from Kensal Drug Company it was then sealed and in the same condition as it had been when it left the factory of Studio Cosmetics Company.

III.

Denies each and every allegation of the first cause of action of plaintiff's complaint not hereinabove admitted or denied for lack of information or belief.

IV.

Denies that as a proximate result of any act or acts, omission or commission on the part of this answering defendant, its agents, servants or employees plaintiff, Sanda Nihill, was injured or damaged in the sum of $250,000.00, or any other sum, whether as alleged in the first amended complaint, or otherwise, or at all.

Answer to Second Cause of Action

I.

Denies each and every allegation contained in Paragraphs I and II of the second cause of action of plaintiff's [52] amended complaint.

II.

Denies that as a proximate result of any conditions alleged in the second cause of action of plaintiff's amended complaint plaintiff, Sanda Nihill, was injured or damaged in the sum of $250,000.00, or any other sum, whether as alleged in the complaint, or otherwise, or at all.

For a First, Separate and Distinct Affirmative Defense, This Answering Defendant Alleges:

I.

That the injuries, damages and loss, if any, sustained by plaintiff herein, were proximately caused

and contributed to by the negligence on the part of the plaintiff in that she did not exercise ordinary care on her own behalf at the time and place referred to in said amended complaint.

For a Second, Separate and Distinct Affirmative Defense, This Answering Defendant Alleges:

I.

That whatever injury or damage, if any, was suffered by the plaintiff, whether as alleged or otherwise, the same was a direct and proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to all times as mentioned in plaintiff's amended complaint on file herein.

For a Third, Separate and Distinct Affirmative Defense, This Answering Defendant Alleges:

I.

That the allegations contained in the first and second causes of action of plaintiff's amended complaint are insufficient to allege a cause of action against this answering defendant on either the theory of negligence or the theory of an alleged breach of warranty. [53]

Wherefore, this answering defendant prays that plaintiff take nothing by her complaint and that this answering defendant have and recover its costs of

suit incurred herein together with such other and further relief as the Court deems just and proper.

SPRAY, GOULD & BOWERS,
/s/ By MALCOLM ARCHBALD,
Attorneys for Defendant Rexall Drug Company. [54]

Affidavit of Service by Mail Attached. [55]

[Endorsed]: Filed January 30, 1958.

[Title of District Court and Cause.]

SEPARATE ANSWER OF ARNOLD L. LEWIS, DOING BUSINESS AS STUDIO COSMETICS COMPANY, TO AMENDED COMPLAINT

Comes now the defendant Arnold L. Lewis, doing business as Studio Cosmetics Company, and after permission of Court first had and obtained separating itself from all other defendants in the above cause, files this his separate answer to plaintiff's amended complaint:

Cause of Action No. One

I.

Answering paragraph III thereof, this answering defendant has no information or belief sufficient to enable him to answer the allegations contained therein, and basing his answer on said ground, denies both generally and specifically each and every allegation contained therein, and the whole thereof.

II.

Answering paragraph IV thereof this answering defendant denies both generally and specifically each and every allegation contained therein, and the whole thereof.

Cause of Action No. Two

I.

Answering paragraph I thereof, this answering defendant denies both generally and specifically each and every allegation contained therein, and the whole thereof.

II.

Answering paragraph II thereof, this answering defendant denies both generally and specifically each and every allegation contained therein, and the whole thereof.

As and For a Separate and Distinct Affirmative Defense This Answering Defendant Alleges As Follows:

I.

That the injuries, damages and loss, if any, sustained by the plaintiff herein, were proximately caused and contributed to by the negligence on the part of the plaintiff in that she did not exercise ordinary care on her own behalf at the time and place referred to in said Amended Complaint.

As and For a Second, Separate and Distinct Affirmative Defense This Answering Defendant Alleges As Follows:

I.

That whatever injury or damage, if any, was suf-

fered by the plaintiff, whether as alleged or otherwise, the same was a direct and proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to all times as mentioned in plaintiff's amended complaint on file herein.

For a Third, Separate and Distinct Affirmative Defense This Answering Defendant Alleges As Follows: [57]

I.

That plaintiff is barred from maintaining an action herein and this answering defendant is not liable herein for any alleged breach by reason of the failure of plaintiff to give notice within a reasonable time of this breach.

This Defendant Demands a Jury Trial.

Wherefore, this answering defendant prays that plaintiff take nothing by reason of the amended complaint on file herein, for costs of suit herein incurred, and for such other and further relief as to the Court seem just and proper in the premises.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By FREDERICK P. BACKER,

Attorneys for Defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company. [58]

Duly Verified.

Affidavit of Service by Mail Attached. [59]

[Endorsed]: Filed February 3, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

No. 1

You are instructed that the rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

California Jury Instructions, Page 28, No. 33. [60]

No. 2

You are instructed that in this case there has been a conflict in the testimony of expert witnesses concerning the cause of the loss of hair by the Plaintiff and whether or not that loss of hair is permanent. You must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, and the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified. Thereupon, you shall find in favor of that expert testi-

mony which, in your opinion, is entitled to the greater weight.

California Jury Instructions, Page 29, No. 33-a. [61]

No. 3

You are instructed that according to the American Experience Table of Mortality, the expectancy of life of one aged 14 years is 46.16 years.

This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if you find that Plaintiff is entitled to a verdict.

However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

California Jury Instructions, Page 219, No. 177. [62]

No. 4

You are instructed that if, and only in the event, you should find that there was an accidental occurrence as claimed by the Plaintiff, namely:

That the Plaintiff used a home cold wave solution manufactured by the Defendant, Studio Cosmetics Company, which contained a chemical of sufficient strength to cause permanent injury to her hair and scalp;

and if you should find that from that accidental event, as a proximate result thereof, Plaintiff has suffered injury, you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the Defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the Plaintiff Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the Defendant to rebut the inference by showing that it did, in fact, exercise the utmost care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part.

California Jury Instructions, Page 319, No. 206; Burt vs. Lake Region Flying Service, 54 N.W. 2d 339 (N. Dak.); Farmers Home Mutual Insurance Company of Medelia, Minnesota, et al. vs. Grand Forks Implement Company, 55 N.W. 2d 315; Bish vs. Employers Liability Insurance Corp., 236 Fed. 2d 62. [63]

[Handwritten Note]: Withdrawn by Mr. L. Not given.

No. 5

You are instructed that direct, positive evidence as to the cause of the injury is not necessary. You are instructed that it is sufficient if the evidence of circumstances will permit a reasonable inference of the alleged cause of injury and exclude other equally reasonable inferences of other causes.

Burt vs. Lake Region Flying Service, 54 N.W. 2d 339 (N. Dak.); Farmers Home Mutual Insurance Company of Medelia, Minnesota, et al. vs. Grand Forks Implement Company, 55 N.W. 2d 315. [64]

[Handwritten Note]: Not Given. Withdrawn in view A 11.

No. 6

You are instructed that negligence may be inferred from circumstances properly adduced in evidence, provided those circumstances raise a fair presumption of negligence; and circumstantial evidence alone may authorize the finding of negligence.

Burt vs. Lake Region Flying Service, 54 N.W. 2d 339 (N. Dak.); Farmers Home Mutual Insurance Company of Medelia, Minnesota, et al. vs. Grand Forks Implement Company, 55 N.W. 2d 315; Bish vs. Employers Liability Insurance Corp., 236 Fed. 2d 62. [65]

[Handwritten Note]: Not given. Replaced by amended No. 6.

No. 7

You are instructed that the manufacturer of a product that is either inherently dangerous, or reasonably certain to be dangerous if negligently made,

owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly or impliedly invited by the manufacturer. Failure to fulfill that duty is negligence.

California Jury Instructions, Page 425, No. 218. [66]

No. 8

You are instructed that this action is brought under two specific counts, one for negligence and the other for breach of warranty. If you find that the Defendants are guilty of no negligence which has caused the injury to the Plaintiff, you must go further.

If you find that the Defendants, or either of them, in its advertising has made representation as to quality and merits of its products aimed directly at the ultimate consumer and urges the consumer to purchase the product from a retailer, and such ultimate consumer does so in reliance on and pursuant to inducements of either of the Defendants and thereby suffers harm in the use of such product, then you shall find for the Plaintiff.

147 N. E. 2d 612. (Ohio 1958).

[Handwritten Note]: Withdrawn for Amended 8. [67]

No. 9

You are instructed that the issuance of an express warranty does not exclude an implied warranty. You are instructed that under the law applicable in this case, there is an implied warranty that the product described by the manufacturer is fit for the purpose for which it is intended, and if you find that the product used by the Plaintiff herein was unfit for the purpose for which it was intended and that it was properly used for that purpose and all directions and instructions of the manufacturer properly carried out, then proof of negligence is unnecessary although it may be present.

Green Mountain Mushroom Company, Inc. vs Brown; 95 Atlantic 2d 679 (Vermont); Blessington vs McCrory Stores Corp., 111 N. E. 2d 421; 37 A. L. R. 2d 698 (N.Y.); Basin Oil Company of California vs Baash-Ross Tool Company, 271, Pacific 2d 122. [68]

No. 10

You are instructed that where a product is sold under a trade name an express warranty does not exclude an implied warranty of reasonable fitness for the general public for which the product was manufactured and sold.

50 N.W. 2d 162, Wade vs Chariot Trailer Company (Mich.).

[Handwritten Note]: Withdrawn.

[Endorsed]: Filed April 1, 1958. [69]

[Title of District Court and Cause.]

JURY INSTRUCTIONS REQUESTED BY THE DEFENDANT, ARNOLD L. LEWIS DOING BUSINESS AS STUDIO COSMETICS COMPANY

The defendant, Arnold L. Lewis doing business as Studio Cosmetics Company, respectfully requests that the following instructions be given to the jury.

Dated: April 8, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By ROBERT C. PACKARD,
Attorneys for Defendant. [70]

No. 1

You are instructed that the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co., is not the insurer or guarantor of plaintiff's condition. The duty of care imposed upon the defendant is not absolute, such as the liability of an insurer would be, but it is only his duty to use ordinary care under the circumstances. [71]

No. 2

The mere fact that the plaintiff, Sandra Mae Nihill, in this case claims to have received damages from the use of the cold wave solution does not prove that such cold wave solution was in fact defective or unfit for the purpose for which it was used. It is incumbent upon the plaintiff to show by

a preponderance of the evidence that such cold wave solution was, in fact, unfit and that the injuries which the plaintiff, Sandra Mae Nihill, received were, in fact, caused by reason of the unfitness of the product for the purpose for which it was used. You may not speculate as to the basis of the cause of the alleged injury.

[Penciled Note]: Withdrawn. [72]

No. 3

If the evidence in this case indicates that the condition of the plaintiff, Sandra Mae Nihill, may have been the result of some act or omission on her part, or may have been the result of natural causes beyond the control of the defendant, it will be your duty to find that the condition was not caused by reason of any act or omission on the part of the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co. [73]

No. 4

In deliberating upon this case, you must bear in mind that not every accident gives rise to a cause of action upon which the party injured may recover damages from some one. Thousands of accidents occur every day, for which no one is to blame—not even the ones who are injured.

Mautino vs. Sutter Hospital, 211 Cal. 556. [74]

No. 5

If you believe, from all of the evidence, that the damage to the plaintiff, Sandra Mae Nihill, was due to some prior condition not discoverable by the de-

fendant in the exercise of ordinary care, then I instruct you that the plaintiff herein cannot recover for any damage which she may have received as the result of the application of the solution in question. [75]

No. 6

If you believe, from all of the evidence, that the damage alleged by the plaintiff, Sandra Mae Nihill, was due to some bodily condition or allergy, not discoverable by the defendant in the exercise of ordinary care, then I instruct you that the plaintiff herein cannot recover for any damage which she may have received as the result of the application of the solution.

[Penciled Note]: Refused. [76]

No. 7

The fact of the accident, that is to say, the fact that the plaintiff was injured, raises no presumption whatever of negligence against the defendant. The burden is upon the plaintiff to prove by evidence, other than mere fact, that the plaintiff was injured, and that the defendant was guilty of some one or more of the acts complained of, and that such acts of negligence on the part of the defendant directly or proximately caused the injury. [77]

No. 8

If you find from all of the evidence that the plaintiff's damage, if any, was caused as a result of a condition present in plaintiff's system, caused by prior treatments or neglect which was not the re-

sult of the application of the solution in question in this case, then I instruct you that you are to find for the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co. [78]

[Penciled Note]: Withdrawn. Packard.

No. 9

You are instructed that if you believe from the evidence that the damage to the plaintiff might be attributable to any one of several causes with equal probability, then I instruct you that you must find against the plaintiff and for the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co.

[Penciled Note]: Withdrawn. [79]

No. 10

You are instructed that in the event you cannot determine from the evidence whether the plaintiff, Sandra Mae Nihill's, injuries are the result of any one of a number of different possibilities, then I instruct you that you must find for the defendant Arnold L. Lewis doing business as Studio Cosmetics Co., and against plaintiff. [80]

No. 11

Where a product is delivered or sold to a person for use and instructions for the use of the product go with it, it is incumbent upon the plaintiff to prove by a preponderance of the evidence that such instructions were followed. The burden is upon the plaintiff. The evidence of compliance with the directions must be shown to you by competent testimony. If in the instant case the plaintiff, Sandra

Mae Nihill, has failed to show by any evidence which preponderates that she followed the directions given for the use of the cold wave solution, then you must find in favor of all of the defendants in this case and against the plaintiffs.

Wood Mutual Credit Company vs. Tobin, 120 N.J.L. 587. [81]

No. 12

If you believe from the evidence that at the time of the sale of the cold wave solution to the plaintiff, Sandra Mae Nihill, there was an express warranty and that as part thereof there was furnished to the said plaintiff directions for the use of the cold wave, there could be no liability by reason of any warranty unless such directions were followed and the cold wave used in accordance therewith.

[Penciled Note]: Withdrawn. [82]

No. 13

The Court instructs you that if in the sale of the cold wave solution the plaintiff, Sandra Mae Nihill, purchased such cold wave solution by its brand or trade name, there is no implied warranty as to fitness for any particular purpose.

[Penciled Note]: Withdrawn. [83]

No. 14

The defendant, Arnold L. Lewis doing business as Studio Cosmetics Co., would not be liable to the plaintiff for the breach of any express warranty

not directly communicated to the plaintiff by said defendant or his agents, servants and employees.

[Penciled Note]: Withdrawn. [84]

No. 15

Before damages may be recovered by reason of breach of warranty in connection with the sale of a commodity, such as cold wave solution, it must first be established by a preponderance of the evidence that the commodity was used in accordance with the directions, if any, furnished for the use of the consumer.

Henry Porter & Company vs. Lacy (1937) 268 Ky. 666.

[Penciled Note]: Withdrawn. [85]

No. 16

Before the plaintiff in this action can recover for a breach of warranty, she must prove by a preponderance of the evidence that the cold wave solution was used by her in the manner required by the instructions from the manufacturer or distributor, if any. If you believe from the evidence that instructions from the manufacturer or distributor were, in fact, furnished to plaintiff, you may not speculate as to whether such instructions were followed but there must be a preponderance of evidence that such instructions were followed.

Briggs vs. National Industries, Inc., 92 Cal. App. (2d) 542.

[Penciled Note]: Withdrawn. [86]

No. 17

The mere fact that I have in the course of these instructions given you particular instructions concerning a negligence and breach of warranty, is not to be construed by you as in any way an intimation by this Court that it feels that there has or has not been any proof upon that particular subject, nor are you to construe it as an expression of opinion of this Court upon the subject. The Court is required by law to give you instructions upon each theory advanced by the parties. [87]

No. 18

If you should believe from the evidence that instructions with reference to the use of the cold wave solution in question were furnished the plaintiff, Sandra Mae Nihill, and should further believe that the plaintiff, Sandra Mae Nihill, in the exercise of ordinary care should have followed said instructions and failed to do so, she was guilty of contributory negligence. If you should believe that the plaintiff, Sandra Mae Nihill, was negligent in this regard and that such negligence contributed to the injury and damage, if any, by the plaintiff sustained, your verdict must be in favor of the defendant. [88]

No. 19

The law makes it the duty of one who knows that he is threatened with damage to do what he reasonably can do to minimize his damage. If you believe from the evidence that subsequent to the time that the plaintiff, Sandra Mae Nihill, was on notice

that she had received certain injuries as a result of the use of the cold wave solution in question, it will be your further duty to decide whether she acted as a prudent person and in the exercise of ordinary care she continued to use the said cold wave solution. If you should further find from the evidence that she did not exercise such care you may not award damages, if any, which could have been avoided by the exercise of such care on the part of the plaintiff, Sandra Mae Nihill.

California Cotton, etc. Assn. vs Byrne, 58 Cal. App. (2d) 340.

[Penciled Note]: Withdrawn. [89]

No. 20

You are instructed that if you find from the evidence in this case that the plaintiff purchased the cold wave solution in question under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

Civil Code 1735, subsection 4.

[Penciled Note]: Withdrawn. [90]

No. 21

The plaintiff claims to have been damaged by reason of breach of certain express warranties made by the defendant. The burden is on the plaintiff in order for her to recover for the breach of any such warranty to prove by a preponderance of the evidence each of the following facts:

1. That such express warranty was, in fact, made

by the defendant sought to be charged. That such express warranty was actually communicated to plaintiff.

2. That she relied thereon.
3. That she was justified in such reliance.
4. That the warranty was breached.
5. That she sustained damages.
6. That those damages were the direct and actual consequence of such breach.

[Penciled Note]: Withdrawn by Packard. Give for Rexall. [91]

No. 22

You are instructed that the plaintiff cannot recover damages for breach of an express warranty if the statements claimed by plaintiff to have been made to her by the defendant, Arnold L. Lewis doing business as Studio Cosmetics Co., were merely affirmations as to the value of the cold wave solution or expressions of his opinion of the cold wave.

Civil Code, Section 1732; Williams vs. Lowenthal (1932) 124 Cal App. 179. [92]

[Penciled Note]: Withdrawn by Packard.

No. 23

It is immaterial if any warranties were made whether they were true or false if, in fact, the breach of such warranties was not the cause of plaintiff's damages, if any. In order for the plaintiff to recover upon a breach of warranty she must establish by a preponderance of the evidence that the particular warranty which she claims was false

and which was breached was the actual cause of the damage. [93]

[Penciled Note]: Withdrawn.

No. 24

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. [94]

Baji, 1

No. 25

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

Baji, 2

No. 26

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection; nor may you draw any inference from the question itself. [96]

Baji, 3

No. 27

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action. [97]

Baji, 4

No. 28

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only

after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. [98]

Baji, 7

No. 29

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict. To that end, the court would remind you that in

your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth. [99]

Baji, 8

No. 30

Upon retiring to the jury room you will select one of your number to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. As soon as twelve of you will have agreed upon a verdict, you shall have it signed and dated by your foreman and then shall return with it to this room. [100]

Baji, 9

No. 31

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against

the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

Baji, 21

No. 32

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You must never assume or speculate to be true any insinuation carried or suggested by a question put to a witness by examining counsel or by the court. The examiner's question is not evidence except only as it explains or throws light upon the answer.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you. [102]

Baji, 23

No. 33

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against

the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption. The court will inform you of any presumption that may become applicable in this case. [103]

Baji, 24

No. 34

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a finding in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that a bal-

ance of probability exists pointing to the accuracy and honesty of the one witness. [104]

Baji, 25

No. 35

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence that shows or pertains to the character of the witness for truth or integrity, or that pertains to his motives, or by proof that he has been convicted of a felony. [105]

Baji, 26

No. 36

A witness false in one part of her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless from all the evidence, you shall believe that the probability of truth favors her testimony in other particulars. [106]

Baji, 27

No. 37

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which lies within the power of one side to produce and of another to contradict.

If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by her on that point. [107]

Baji, 30

No. 38

In the present action certain testimony has been read to you by way of deposition.

You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you from the witness stand.

Baji, 31 [108]

No. 39

In the trial of this case there were instances when certain evidence was admitted as against one or more of the defendants, but denied admission as against the others.

Your attention was called to these matters when the rulings were made. But I would urge you again to keep in mind the distinctions pointed out in such rulings, and their effect. It may be difficult for you, when considering the case for or against

any one party, to completely disregard any evidence that you have heard or seen, but that is your plain duty with respect to evidence not admitted by the court as against that party, and you must try conscientiously to so treat such a situation.

Baji, 32 [109]

[Penciled Note]: Withdrawn.

No. 40

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

Baji, 33 [110]

[Penciled Note]: Withdrawn.

No. 41

In examining an expert witness, such as a physician and surgeon, counsel may propound to him a type of question known in law as a hypothetical question. By such a question the witness is asked

to assume to be true a hypothetical state of facts, and to give an opinion based on that assumption.

In permitting such a question, the Court does not rule, and does not necessarily find even in its own mind, that all the assumed facts have been proved. It only determines that those assumed facts are within the probable or possible range of the evidence.

It is for you, the jury, to find from all the evidence whether or not the facts assumed in a hypothetical question have been proved, and if you should find that any assumption in such a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

Failure to prove a fact assumed in a hypothetical question may make the opinion based on it entirely worthless, or the opinion may, nevertheless, have weight and value, depending on the relationship of such an assumed fact to the issues of the case, the facts proved and the expert opinion. In respect to such a matter, you will apply your own reasoning to the end of drawing a conclusion that will be just and sound.

Baji, 33-C [111]

No. 42

A physician may be permitted to testify concerning statements made to him by a patient in connection with his effort to learn the patient's history and condition for purposes of diagnosis and treatment. Such evidence is received and may be con-

sidered for only the limited purpose of showing the information upon which the physician based his opinions. The statements so repeated by him may not be regarded as evidence of their own truth. However, when a patient's statement to a physician consists of a spontaneous exclamation, cry, complaint or other expression of present pain or distress, the physician may give testimony of that experience as evidence tending to show that the patient then experienced pain or distress. However, also, if it appears that a person made a statement to a physician which was in conflict with that person's testimony in court, the inconsistency may be considered in determining the credibility of the witness.

Baji, 33-D [112]

[Penciled Note]: Withdrawn.

No. 43

The Court will endeavor to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the Court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

Baji, 35-A [113]

No. 44

Although there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. The instructions given govern the case as to each defendant, insofar as they are applicable to him, to the same effect as if he were the only defendant in the action, and regardless of whether reference is made to defendant or defendants in the singular or plural form.

Baji, 53 [114]

No. 45

Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. This definition of negligence applies irrespective of whose conduct is in question, whether that of the defendants, or of the plaintiff, or of any other person.

Baji, 101 [115]

No. 46

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether or not negligence occurred in a given case, the

conduct in question must be considered in the light of all the surrounding circumstances as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore, we ask: "What conduct might reasonably have been expected of a person of ordinary prudence in the same circumstances?" Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

Baji, 101-A [116]
[Penciled Note]: Withdrawn.

No. 47

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Baji, 101-B [117]

No. 48

The mere fact, if it is a fact, that it was possible for a person to avoid an accident that he did not avoid, does not, of itself, justify a finding that he

was negligent or contributorily negligent. If a person exercised ordinary care and did all that an ordinarily prudent person would have done in the circumstances to avoid an accident, she is not chargeable with negligence or contributory negligence.

Baji, 101-E [118]

No. 49

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

Baji, 102 [119]

No. 50

Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances.

To put the matter in another way, the amount of caution involved in the exercise of ordinary care, and hence required by law, increases or decreases as does the danger that reasonably should be apprehended.

Evidence as to whether or not a person conformed to a custom that had grown up in a given locality or business is relevant and ought to be considered, but is not necessarily controlling on the

question whether or not he exercised ordinary care, for that question must be determined by the standard of care that I have stated to you.

Baji, 102-A [120]

[Penciled Note]: Withdrawn.

No. 51

Contributory negligence is negligence on the part of a person injured, which, cooperating with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

You will note that in order to amount to contributory negligence, a person's conduct must be not only negligent, but also one of the proximate causes of her injury.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation.

Baji, 103 [121]

No. 52

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly

or through intermediate agencies or through conditions created by such agencies.

Baji, 104 [122]

No. 53

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

Baji, 131 [123]

No. 54

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issues of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to fulfill her burden of proof.

To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or, if he was, that his negligence was not a proximate cause of the accident, as it is that some negligence on her part was such a cause, then a case against the defendant has not been established.

Baji, 132. [124]

No. 55

In determining whether negligence or proximate cause, or contributory negligence, or any claim or allegation in this case has been proved by a preponderance of evidence, you should consider all the evidence bearing either way upon the question, regard-

less of who produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself.

Baji, 133. [125]

No. 56

The burden rests upon the plaintiff to prove by a preponderance of the evidence the elements of her damage, if any. The mere fact that an accident happened, considered alone, would not support a verdict for any particular sum.

Baji, 171-A. [126]

No. 57

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for future detriment which, although possible, is remote, conjectural or speculative.

However, should you determine that the plaintiff is entitled to recover, you should compensate her for future detriment if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury in question.

Baji, 171-B. [127]

No. 58

If you should find that plaintiff, Sandra Mae Nihill, suffers from some unfortunate condition which has not been proximately caused by any neg-

ligence on defendant's part, you may not assess any damages for that condition against defendant. However, if negligence on defendant's part has been a proximate cause of aggravating a previously existing disability suffered by said plaintiff, that effect should be considered by you in fixing damages, if your decision on the question of liability is in favor of plaintiff.

Baji, 171-C. [128]
[Penciled Note]: Withdrawn.

No. 59

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Baji, 180. [129]

[Endorsed]: Filed April 8, 1958.

[Title of District Court and Cause.]

DEFENDANT REXALL DRUG COMPANY'S REQUESTED JURY INSTRUCTIONS

The defendant, Rexall Drug Company, a corporation, respectfully requests that the following instructions be given to the jury:

Dated: April 9, 1958.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,

Attorneys for Defendant Rexall Drug Company. [130]

No. 1

When a distributor purchases a commodity such as cold wave solution from a manufacturer for resale, he is under no duty to make tests for the purpose of discovering whether or not it has dangerous characteristics. [131]

No. 2

You are instructed that the defendant Rexall Drug Company was not an insurer of the safety of the plaintiff. [132]

No. 3

You are instructed to return a verdict in favor of the defendant Rexall Drug Company, a corporation. [133]

No. 4

No matter how negligent the defendants may or may not have been, yet, if any negligence on the part of the plaintiff, Sandra Mae Nihill, however slight, proximately contributed to the occurrence of the accident, then you are instructed that the plaintiff cannot recover in this action on the issue of negligence. [134]

No. 5

You are instructed that on the issue of negligence, that the existence or non-existence of negligence

depends upon the existence or non-existence of legal duty on the part of the person sought to be charged with negligence.

You are further instructed that a person cannot be charged with negligence unless he has knowledge of the existence or non-existence of the facts which give rise in law to a duty. [135]

No. 6

Neither suspicion, nor speculation, nor surmise is evidence and a verdict cannot be sustained where it depends on suspicion, or surmise, or speculation, or guess-work. [136]

No. 7

A person is not required to give any notice or warning of obvious danger.

Shanley vs. American Olive Co., 185 Cal. 552. [137]

No. 8

If in this case the defendant Rexall Drug Company resold Cara Nome cold wave in its original package and at the time of such sale knew of no fault in the product and knew of nothing to place them upon guard against such product, you will find for the defendant Rexall Drug Company and against the plaintiff.

Restatement of Torts, Vol. 2, Page 402. [138]

No. 9

You are instructed that where an intermediate seller repeats any of the matters contained on the manufacturer's label of the product sold, such inter-

mediate seller or dealer does not thereby adopt such statements as his own and is not liable therefor. In this case, if you find from the evidence that Rexall Drug Company merely repeated the matters contained upon the label put out by the manufacturer covering Cara Nome, Rexall Drug Company thereby made no warranties of their own.

Cushman v. McDonald, 23 Washington 2d 348 (1945); Pemberton v. Dean, 88 Minn. 60 (1902). [139]

No. 10

Rexall Drug Company was not the agent of Studio Cosmetics Company either in the sale of Cara Nome cold wave, to the plaintiff, Sandra Mae Nihill, or as to any representations made in connection with the said sale. [140]

No. 11

A distributor who purchases a commodity for resale, the characteristics of which cannot be discovered by ordinary examination or observation, cannot be held liable for alleged negligence in connection with the resale of such commodity by reason of injuries arising out of the defects therein of which he had no actual knowledge. [141]

No. 12

Unless you believe from a preponderance of the evidence that the distributors knew or had cause to know that the cold wave in question was harmful when used in accordance with instructions, or knew or had reason to know of any negligence in connec-

tion with the preparation and marketing thereof, or concealed knowledge of injurious properties, you will find for the defendant distributor, Rexall Drug Company on the issue of negligence.

Quiriri v. Freeman, 98 A.C.A. 240. [142]

No. 13

If the defendant Rexall Drug Company in turn purchased the solution known as Cara Nome Cold Wave from sources which in each instance a reasonably prudent person would have considered reliable sources for the product to be purchased, then such defendant was not guilty of negligence in accepting the representations which came with such product and in turn submitting such representations to the immediate buyer of such defendant. [143]

No. 14

The distributors cannot be held liable in this action for any negligent act or omission on the part of the manufacturer. Before the plaintiff can recover upon any allegation or claim of negligence on the part of any distributor they must establish by a preponderance of the evidence that there was some specific act or omission on the part of the distributor sought to be charged constituting negligence. [144]

No. 15

If in the exercise of ordinary care the Rexall Drug Company had no knowledge that the cold wave solution in question was dangerous or was likely to be dangerous they would not be liable for damages which may have resulted to the plaintiff

by reason of the defective condition or dangerous properties, if any, of said cold wave solution.

Restatement of Torts, Section 402. [145]

No. 16

The plaintiff, if entitled to recover damages herein as to any defendant, will only be entitled to recover as against any particular defendant such damages, if any, as have been shown by a preponderance of the evidence to have been proximately caused by the acts or omissions alleged in the particular cause of action upon which the plaintiff is proceeding against such defendant. [146]

No. 17

A distributor who purchases and sells an article in common and general use in the ordinary course of trade and business without knowledge of its dangerous qualities, if any, is under no duty to discover defects therein.

Tourte v. Horton, 108 Cal. App. 22. [147]

No. 18

The responsibility of determining whether or not a commodity manufactured and placed in ordinary trade channels is foreseeably dangerous when used for the purpose for which it is manufactured is upon the manufacturer. A distributor who purchases from such manufacturer for the purpose of resale has no duty to make an examination or test to discover whether the commodity is dangerous or not. [148]

No. 19

There is no duty in law devolving upon the defendant Rexall Drug Company to have the cold wave solution in question analyzed by chemists and failure to do so does not constitute negligence. [149]

No. 20

The law imposes upon a party injured by another's breach of contract or tort when under all of the circumstances of the particular case it appears a reasonable duty which he ought to perform the act or duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or wilfulness he allows the damages to be unneccessarily enhanced, the increased loss which would have been avoided by the performance of his duty falls upon him.

Mabb. v. Stewart, 147 Cal. 413. [150]

[Endorsed]: Filed April 10, 1958.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled to try the above-entitled cause, find for the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian, John Nihill, and against the defendants, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and assess her damages in the sum of $48,000.00.

Dated: April 16, 1958, at Los Angeles, California.

/s/ EARLE H. THOMAS,
Foreman of the Jury. [151]

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 14, 1958, at Los Angeles, Calif.

Present: Hon. Fred L. Wham, District Judge.

Deputy Clerk: Irwin Young; Reporter: Ella West.

Counsel for Plaintiff: P. W. Lanier, Jr., and James G. Rourke; counsel for Defendants: Philip Bradish and Robert C. Packard.

Proceedings: For further jury trial. Court convenes at 10.02 a.m. Counsel for both sides and the jury are present. Court orders trial proceed.

Attorneys Bradish and Packard read deposition of Dr. Michaelson.

Attorneys Lanier and Rourke read cross examination of said deposition.

Court and counsel confer out of hearing of the jury.

At 10:50 a.m. Court declares a recess. At 11:02 a.m. Court reconvenes herein. The jury and counsel are present as before. Court orders trial proceed.

Thomas Henry Stark, heretofore sworn, is recalled and testifies further.

Def'ts' Ex. B is marked for ident. and admitted in evidence.

Attorneys Bradish and Packard read deposition of Gerald D'Amour.

Arnold L. Lewis, heretofore sworn, is recalled and testifies further.

Def'ts' Ex. C, D, E, F, and G are marked for ident. and admitted in evidence.

Plf's Ex. 1-A is marked for ident. and admitted in evidence.

At 12:05 p.m. Court admonishes the jury not to discuss this cause and declares a recess.

At 2:02 p.m. Court reconvenes herein. The jury and counsel are present. Court orders trial proceed.

Arnold L. Lewis resumes the stand and testifies further.

Def'ts' Ex. A, heretofore marked for ident., is admitted in evidence.

Defendants rest.

Court and counsel confer out of hearing of the jury.

Court admonishes the jury not to discuss this cause and excuses the jury until 10 a.m., April 15, 1958.

Court and counsel retire to Chambers.

Upon statement of plaintiff Court orders cause dismissed as to defendant Rexall Drug Co. on count one, and dismissed as to defendant Arnold L. Lewis on count two.

Attorney Packard moves the Court for directed verdict as to defendant Arnold L. Lewis on count one. Court denies said motion.

Attorney Bradish, on behalf of defendant Rexall

Drug Co., moves for directed verdict as to count two. Court denies said motion.

Court and counsel discuss admissibility of jury instructions.

It Is Ordered that cause is continued to 9:30 a.m., April 15, 1958, for further jury trial, on the special calendar.

JOHN A. CHILDRESS,
Clerk,
/s/ By IRWIN YOUNG,
Deputy Clerk. [152]

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR JUDGMENT NOTWITHSTANDING THE VERDICT AGAINST ARNOLD L. LEWIS DOING BUSINESS AS STUDIO COSMETICS COMPANY, IN THE ALTERNATIVE RESERVING, IF DENIED, THE RIGHT TO APPLY FOR A NEW TRIAL

To the Plaintiff and to Her Attorneys:

You, and Each of You, Will Please Take Notice that the defendant, Arnold L. Lewis doing business as Studio Cosmetics Company, through his counsel, at a time and place to be designated by the above entitled court, intends to and will move the court for a judgment in favor of said defendant notwithstanding [153] the verdict of the jury in said case. Said motion will be made in the alternative, pursuant to the provisions of Rule 50, subsections (a)

and (b), of the Federal Rules of Civil Procedure, and reserving to said defendant in the event said motion is denied, the right to move contemporaneously for a new trial upon each and all of the grounds set forth in the Notice of Intention to Move for a New Trial filed concurrently herewith. Said motion for judgment notwithstanding the verdict will be made upon the following grounds, and each of them, severally:

1. That said defendant made a motion for a directed verdict, which said motion was not, but should have been, granted.

2. That the evidence fails to show that said defendant was guilty of any actionable negligence.

3. That the evidence fails to show any negligence on the part of this defendant which proximately caused the injuries or damages sustained by the plaintiff, if any.

That said motion will be based upon the evidence submitted at the trial of the herein action, upon the memorandum of points and authorities to be filed and served herewith, and upon all of the pleadings, exhibits, documents, records and files in said action.

Dated this 18th day of April, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By ROBERT C. PACKARD,

Attorneys for Defendant, Arnold L. Lewis dba Studio Cosmetics Company. [154]

Affidavit of Service by Mail Attached. [155]

[Endorsed]: Filed April 21, 1958.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL MADE CONTEMPORANEOUSLY WITH MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE

To the Plaintiff and to her Attorneys:

You, And Each Of You, Will Please Take Notice that in the above entitled action wherein judgment has heretofore been rendered in favor of the plaintiff and against the defendant, Arnold L. Lewis doing business as Studio Cosmetics Company, that said defendant has contemporaneously herewith filed his motion for a judgment notwithstanding the verdict, said motion [160] being in the alternative form and reserving the right to move for a new trial in the event said motion is denied.

You, And Each Of You, Will Please Take Notice that in the event the court does deny the motion for a judgment notwithstanding the verdict, the defendant will contemporaneously herewith move the court for a new trial at such time and place as may be designated by the above entitled court.

Said motion for a new trial will be made upon the following grounds, and each of them:

1. Irregularities in the proceedings of the court by which this moving defendant was prevented from having a fair trial.

2. Irregularities in the proceedings of the jury

by which this moving defendant was prevented from having a fair trial.

3. Irregularities in the proceedings of the plaintiff by which this moving defendant was prevented from having a fair trial.

4. That orders of the court occurred during the trial which prevented this moving defendant from having a fair trial.

5. Misconduct of the jury which prevented this moving defendant from having a fair trial.

6. Accident or surprise which ordinary prudence could not have guarded against.

7. Newly discovered evidence material to the defendant which the defendant could not with due diligence have discovered or produced at the trial.

8. Excessive damages appearing to have been given under the influence of passion or prejudice.

9. Insufficiency of the evidence to justify the verdict of the jury.

10. That the verdict of the jury was against the law.

11. Insufficiency of the evidence to sustain the judgment rendered.

12. Errors in law occurring at the trial and excepted to by this defendant.

Said motion will be made upon a memorandum of points and authorities hereafter to be served and filed, upon affidavits to be served and filed, upon the minutes of the court, the court reporter's report of said proceedings at the trial of this case, and upon all the pleadings, exhibits, records and files in said action.

Dated this 18th day of April, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD,

/s/ By ROBERT C. PACKARD,

Attorneys for Defendant, Arnold L. Lewis dba Studio Cosmetics Company.

Affidavit of Service by Mail Attached. [163]

[Endorsed]: Filed April 21, 1958.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR NEW TRIAL, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

To Plaintiff and to her Attorneys:

You And Each Of You Will Please Take Notice that the defendant Rexall Drug Company, a corporation, through its counsel, at a time and place to be designated by the above entitled court, will move the Court to:

1. Set aside the verdict entered in the above entitled action on April 16, 1958, and the judgment entered thereon, and to enter judgment in favor of the defendant Rexall Drug Company, a corporation, in accordance with the motion for directed [172] verdict made by said defendant at the close of all the testimony herein, on the grounds as stated therein, in that plaintiff failed to prove any cause of action against this moving defendant, and failed

to prove the existence of any express warranty running from this defendant to the plaintiff; upon the ground that plaintiff failed to prove the breach of any express warranty from this defendant to the plaintiff, and upon the further ground that there was no evidence establishing that the breach of any alleged express warranty proximately caused the injuries of which plaintiff complained. Said motion will be made severally upon each and every one of the grounds set forth herein and upon each and every one of the grounds heretofore stated in defendant's motion for a directed verdict.

Said motion will be made in the alternative, pursuant to the provisions of Rule 50, subsections (a) and (b) of the Federal Rules of Civil Procedure, and reserving to the defendant Rexall Drug Company, a corporation, in the event said motion is denied, the right to move contemporaneously for a new trial.

2. In the alternative, defendant Rexall Drug Company will move the Court to set aside the verdict, and the judgment entered thereon, and grant said defendant a new trial on the following grounds:

a) The verdict and judgment are contrary to the law;

b) The verdict and judgment are contrary to the evidence;

c) The evidence in this case is totally insufficient to show any liability on the part of the defendant Rexall Drug Company, a corporation, and there is no evidence to sustain a verdict and judgment.

d) The verdict of the jury herein is excessive

and appears to have been given under the influence of passion and prejudice. [173]

e) Irregularities in the proceedings of the Court by which this moving defendant was prevented from having a fair trial;

f) Irregularities in the proceedings of the plaintiff by which this moving defendant was prevented from having a fair trial;

g) That orders of the Court occurred during the trial, which were objected to by this moving defendant, which prevented this defendant from having a fair trial;

h) Errors in law occurring at the trial and excepted to by this defendant.

Said motion for a new trial will be predicated upon each and every one of the aforesaid grounds severally.

Said motions and each thereof will be predicated upon this motion, upon the memorandum of points and authorities filed contemporaneously herewith, upon all of the pleadings, exhibits, documents, records and files in said action and upon any subsequent written memoranda which may be permitted to be filed by this Honorable Court.

* * * * *

Dated: April 25, 1958.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,
Attorneys for defendant Rexall Drug Company, a corporation. [174]

Affidavit of Service by Mail Attached. [175]

[Endorsed]: Filed April 28, 1958.

In the District Court of the United States, Southern District of California, Central Division

No. 258-57 WM

SANDRA MAE NIHILL, a minor, by her father and regular guardian, JOHN NIHILL,
Plaintiff,

vs.

REXALL DRUG COMPANY, a corporation, etc., et al.,
Defendants.

JUDGMENT ON THE VERDICT

This cause came on for trial before the Court and the jury impaneled therein, and the jury found for said plaintiff and against each defendant, and fixed the damages in favor of the plaintiff in the sum of Forty eight thousand dollars ($48,000.00).

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian John Nihill, be awarded damages in the amount of Forty eight thousand dollars ($48,000.00), against the defendants, Rexall Drug Company, a corporation, doing business as Cara Nome, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and that the said plaintiff have and recover costs herein taxed in the sum of $177.90.

Dated at Los Angeles, California, April 16, 1958.

JOHN A. CHILDRESS,
Clerk,
/s/ By C. A. SIMMONS,
Deputy Clerk. [183]

[Endorsed]: Filed and Entered April 29, 1958.

United States District Court
Southern District of California

Office of the Clerk

Room 231, U. S. Post Office & Court House

Los Angeles 12, California

SPRAY, GOULD & BOWERS, Esqs.
1671 Wilshire Blvd.,
Los Angeles 17, Calif.

JAMES G. ROURKE, Esq.
First Western Bank Bldg.,
Santa Ana, Calif.

RE: Nihill, etc., v. Rexall Drug Co. etc., et al., No. 258-57-WM.

You are hereby notified that judgment on the verdict in the above-entitled case has been entered this day in the docket.

Dated: April 29, 1958.

CLERK, U. S. DISTRICT COURT,
By C. A. SIMMONS,
Deputy Clerk. [184]

[Title of District Court and Cause.]

ORDER

The above entitled matter having come on for hearing before this Court upon the motions of the attorneys for both defendants for a judgment notwithstanding the verdict, and in the alternative, for a new trial, and briefs having been submitted by all parties, and the Court having considered same and all the files and records herein,

It Is Hereby Ordered, that each of the defendants' separate motions for judgment notwithstanding the verdict, and in the alternative, for a new trial, are now denied, and

It Is Further Ordered, that the judgment of the Court against each of the respective defendants is ordered to stand as entered upon the verdict of the jury.

By the Court:

/s/ FRED L. WHAM,
Judge. [185]

[Endorsed]: Filed and Entered June 26, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant Arnold L. Lewis, doing business as Studio Cosmetics Company, hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

1. The final judgment on the verdict entered on April 29, 1958;

2. The order denying defendant's motion for a directed verdict, entered on June 26, 1958;

3. The order entered on June 26, 1958 denying the defendant's motion for a judgment notwithstanding the verdict; and

4. The order entered on June 26, 1958 denying the defendant's motion for a new trial. [186]

The names and address of appellant's attorneys are: Reed, Callaway, Kirtland & Packard, 639 South Spring Street, Los Angeles, California, and Henry E. Kappler, 453 South Spring Street, Los Angeles, California.

Dated: July 18, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD AND HENRY E. KAPPLER,

/s/ By HENRY E. KAPPLER,

Attorneys for Arnold L. Lewis, doing business as Studio Cosmetics Company. [187]

Affidavit of Service by Mail Attached. [188]

[Endorsed]: Filed July 23, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant Rexall Drug Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

1. The final judgment on the verdict entered April 29, 1958.

2. The order entered on June 26, 1958, denying defendant's motion for a directed verdict.

3. The order denying the defendant's motion for a judgment notwithstanding the verdict, entered on June 26, 1958.

4. The order denying the defendant's motion for a new trial, entered on June 26, 1958. [189]

The name and address of appellant's attorneys are as follows:

Spray, Gould and Bowers, 1671 Wilshire Boulevard, Los Angeles 17, California.

Dated: July 17, 1958.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,

Attorneys for Rexall Drug Company, a corporation. [190]

Affidavit of Service by Mail Attached. [191]

[Endorsed]: Filed July 23, 1958.

[Title of District Court and Cause.]

STIPULATION RE: APPEAL BOND

It Is Stipulated, by and between the plaintiff and respondent herein, by and through her counsel of record, and the defendant and appellant, Arnold L. Lewis, doing business as Studio Cosmetics Company, through his counsel of record, that a bond in the sum of $55,000.00, shall be sufficient in so far

as Def. Lewis is concerned on and for the appeal cost and supersedeas in the above-entitled action.

Dated: July 12, 1958.

LANIER, LANIER & KNOX and
JAMES G. ROURKE,
/s/ By P. W. LANIER, Jr.,
Attorneys for Plaintiff and Respondent.

REED, CALLAWAY, KIRTLAND &
PACKARD,
/s/ By ROBERT C. PACKARD,

Attorneys for Defendant and Appellant, Arnold L. Lewis, doing business as Studio Cosmetics Company.

It is so ordered. Date: July 28, 1958.

/s/ WM. C. MATHES,
Judge. [200]

[Endorsed]: Filed July 29, 1958.

[Title of District Court and Cause.]

STIPULATION RE: FILING OF APPEAL BOND

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that a bond in the sum of Fifty-five Thousand ($55,000.-00) Dollars shall be sufficient insofar as the defendant Rexall Drug Company, a corporation, is concerned, the appeal cost and supersedeas in the above entitled action.

Dated: This 21st day of July, 1958.

LANIER, LANIER & KNOX,
/s/ By P. W. LANIER, Jr.,
/s/ JAMES G. ROURKE,

Attorneys for Plaintiff and Respondent.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,

Attorneys for Defendant and Appellant Rexall Drug Company, a corporation.

It is so ordered. Date: July 30, 1958.

/s/ WM. C. MATHES,
Judge. [201]

[Endorsed]: Filed July 30, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the appellant Arnold L. Lewis, doing business as Studio Cosmetics Company, and designates for inclusion the entire record and all of the proceedings and evidence in the above entitled action, including:

1. The complaint and summons thereon;
2. The amended complaint;
3. The answer to the amended complaint;
4. The plaintiff's interrogatories;
5. The answers of the defendant Arnold L. Lewis to plaintiff's interrogatories;

6. Memorandum of plaintiff's contentions of fact and law;

7. Pretrial memorandum of Arnold L. Lewis;

8. Trial memorandum of Arnold L. Lewis; [192]

9. Order of April 14, 1958 dismissing Count II of amended complaint as to appellant Arnold L. Lewis;

10. All instructions given by the Court to the jury at the request of either party;

11. All instructions requested by either party and refused by the trial court;

12. Any and all instructions given by the court on its own motion;

13. The verdict of the jury;

14. The judgment on the verdict;

15. Notice of motion notwithstanding the verdict or for a new trial and points and authorities accompanying said motions;

16. Order denying defendant's motion for a directed verdict and defendant's motion for a judgment notwithstanding the verdict, particularly order of June 26, 1958;

17. Defendant's motion for a new trial;

18. Notice of Clerk on entry of verdict;

19. Notice of appeal;

20. Stipulation re appeal bond;

21. The entire stenographic transcript of all of the testimony and evidence received by the Court;

22. Defendant's supersedeas bond;

23. All exhibits introduced in evidence by the

defendant Arnold L. Lewis, save and except the bottles of permanent wave solution and other similar exhibits incapable of being included in the printed record;

24. All exhibits marked for identification and offered by the defendant in evidence and refused by the Court, which are capable of being included in the printed record;

25. All exhibits introduced in evidence or offered in evidence by appellant and which are incapable of being included within the transcript are requested by appellant to be transmitted [193] by the Clerk of the District Court to the Court of Appeals;

26. Designation of record on appeal;

27. No depositions, whether or not designated as exhibits, are to be printed for the reason that the material portions of all depositions were read into the record and will be a part of the reporter's transcript.

Dated: July 28, 1958.

REED, CALLAWAY, KIRTLAND & PACKARD AND HENRY E. KAPPLER,

/s/ By HENRY E. KAPPLER,

Attorneys for appellant. [194]

Affidavit of Service by Mail Attached. [195]

[Endorsed]: Filed July 28, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the appellant Rexall Drug Company, a corporation, and designates for inclusion the entire record and all of the proceedings and evidence in the above entitled action, including:

1. The complaint and summons thereon;
2. The amended complaint;
3. The answer to the amended complaint;
4. The plaintiff's interrogatories;
5. The answers of the defendant Rexall Drug Company, a corporation, to plaintiff's interrogatories;
6. Memorandum of plaintiff's contentions of fact and law;
7. Pretrial memorandum of Rexall Drug Company;
8. Trial memorandum of Rexall Drug Company;
9. Order of April 14, 1958 dismissing Count I of amended complaint as to appellant Rexall Drug Company;
10. All instructions given by the court to the jury at the request of either party;
11. All instructions requested by either party and refused by the trial court;
12. Any and all instructions given by the court on its own motion;
13. The verdict of the jury;
14. The judgment on the verdict;
15. Notice of motion notwithstanding the verdict

or for a new trial and points and authorities accompanying said motions;

16. Order denying defendant's motion for a directed verdict and defendant's motion for a judgment notwithstanding the verdict, particularly order of June 26, 1958;

17. Defendant's motion for a new trial;

18. Notice of Clerk on entry of verdict;

19. Notice of appeal;

20. Stipulation re appeal bond;

21. The entire stenographic transcript of all of the testimony and evidence received by the court;

22. Defendant's supersedeas bond;

23. All exhibits introduced in evidence by the defendant Rexall Drug Company, save and except any exhibits incapable of being included in the printed record;

24. All exhibits marked for identification and offered by the defendant in evidence and refused by the court, which are capable of being included in the printed record;

25. All exhibits introduced in evidence or offered in evidence by appellant and which are incapable of being included within the transcript are requested by appellant to be transmitted by the Clerk of the District Court to the Court of Appeals; [197]

26. Designation of record on appeal.

No depositions, whether or not designated as exhibits, are to be printed, since the material portions of all depositions were read into the record and will be a part of the reporter's transcript.

Dated: July 28, 1958.

SPRAY, GOULD & BOWERS,

/s/ By PHILIP L. BRADISH,

Attorneys for Appellant. [198]

Affidavit of Service by Mail Attached. [199]

[Endorsed]: Filed July 28, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above entitled Court, hereby certify the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above matter.

A. The foregoing pages numbered 1 to 205, inclusive, containing the original:

Complaint.

Summons.

Amended Complaint.

Answer to Amended Complaint (Rexall Drug Co.) filed 4/15/57.

Plaintiff's Interrogatories.

Plaintiff's Memorandum of Contentions of Fact and Law.

Arnold L. Lewis, etc., Answers to Plaintiff's Interrogatories.

Rexall Drug Co., Answers to Plaintiff's Interrogatories.

Pre-Trial Conference Order.

Separate Answer of Rexall Drug Co. to Amended Complaint.

Separate Answer of Arnold L. Lewis, etc., to Amended Complaint.

Plaintiff's Requested Jury Instructions.

Defendant Arnold L. Lewis Requested Jury Instructions.

Defendant Rexall Drug Co., Requested Jury Instructions.

Verdict.

Minute Order of 4/14/58.

Notice of Intention to move for judgment notwithstanding the verdict against Arnold L. Lewis, etc., in the alternative reserving, if denied, the right to apply for a new trial.

Defendant Arnold L. Lewis' Memorandum of Points and Authorities in support of motion for judgment notwithstanding the verdict.

Notice of Intention of Arnold L. Lewis, etc., to move for a new trial made contemporaneously with motion for judgment notwithstanding the verdict and in the alternative.

Defendant Arnold L. Lewis, etc., Memorandum of Points and Authorities in support of Motion for a New Trial.

Defendant Rexall Drug Co., notice of intention to move for judgment notwithstanding the verdict or new trial, and memorandum of points and authorities in support thereof.

Judgment on the Verdict.

Clerk's notice of entry of Judgment on the Verdict.

Order denying each of the Defendants' separate motions for judgment notwithstanding the verdict, etc.

Notice of Appeal filed by Arnold L. Lewis, etc.

Notice of Appeal filed by Rexall Drug Co.

Designation of Record on Appeal—Arnold L. Lewis.

Designation of Record on Appeal—Rexall Drug Co.

Stipulation and Order re Appeal Bond—Arnold L. Lewis.

Stipulation and Order re Appeal Bond—Rexall Drug Co.

Application and Order extending time within which to file record on Appeal—Rexall Drug Co.

Application and Order extending time within which to file record on Appeal—Arnold L. Lewis.

B. Three volumes of Reporter's Official Transcript of Proceedings had on:

April 8, 1958; April 9, 1958; April 10, 1958; April 11, 1958; April 14, 1958; April 15, 1958 and April 16, 1958.

C. Plaintiff's Exhibits 1 to 34, inclusive.

Defendants' Exhibits A to G, inclusive.

D. Deposition of Dr. Henry E. Michelson.

Deposition of Dr. Frank M. Melton and Charles A. Schmid.

Deposition of Mrs. Carl Carlson.

Deposition of Mrs. Donald Carlson.

Deposition of Sandra Mae Nihill.

Deposition of Dr. Clarence S. Martin.
Deposition of Gerard L. D'Amour.
Deposition of Mrs. Adaline Jorgenson.
Deposition of Mrs. John W. Nihill.

I further certify that my fee for preparing the foregoing record amounting to $2.40, has been paid by appellants.

Dated: December 8, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By WM. A. WHITE,
Deputy Clerk.

United States District Court, Southern District of California, Central Division

Civil Action No. 258-57 WM

SANDRA MAE NIHILL, a minor, by her father and regular guardian, JOHN NIHILL,
Plaintiff,

vs.

REXALL DRUG COMPANY, a corporation, d/b/a CARA NOME REXALL, and ARNOLD L. LEWIS, d/b/a STUDIO COSMETICS COMPANY,
Defendants.

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Honorable Fred L. Wham, Judge—Presiding.

Be It Remembered that a hearing was had in

the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, sitting by assignment, and a Jury, in the Federal Court Room, Federal Building, in the City of Los Angeles, State of California, on April 8, 1958, beginning at the hour of eleven-fifteen o'clock A.M.

Appearances: The plaintiff was represented by her attorneys James G. Rourke, Esq., of Santa Ana, California, and P. W. Lanier, Jr., [1*] Esq., of Fargo, North Dakota.

The defendant, Rexall Drug Company, was represented by its attorneys, Spray, Gould & Bowers, by Philip L. Bradish, Esq., of Los Angeles, California.

The defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, was represented by his attorneys, Reed, Callaway, Kirtland & Packard, by Robert C. Packard, Esq., of Los Angeles, California.

Whereupon, the following proceedings were had in open Court:

The Court: You may call the jury. I take it that both sides are ready to proceed?

Mr. Lanier: Plaintiff is ready, your Honor.

Mr. Packard: Defendants are ready, your Honor.

The Court: Call the jury.

Whereupon, the following jurors were impaneled and sworn:

Ruth H. Swenson.

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* Page numbers appearing at bottom of page of Reporter's Transcript of Record.

Wyman G. Acton. [2]
Ruth C. Berghoefer.
Frank D. Obenour.
Elmer M. Greening.
Gene D. Whitfield.
Earle H. Thomas.
Wilson L. Venton.
Joseph L. Hancock.
Lorraine Tawam.
Lillie A. Mitchell.
Frances Brayton.

The Court: Now, I take it, that under the Rules, you gentlemen would prefer to have an alternate juror. It will take some time to try the case, I assume. Or——

Mr. Packard: I think, your Honor, it's only in criminal cases where they have an alternate juror.

The Court: Well, that's a mistake. They have them in civil also.

Mr. Packard: Well, I mean if the parties stipulate.

The Court: Let me see counsel at the table just a moment. [3]

(Whereupon, counsel and the reporter approached the Bench, and out of the hearing of the jury the following discussion was had between the Court and counsel:)

The Court: It has been my practice—usually it has been my practice—instead of calling an alternate juror and make them sit through the whole case, that counsel will agree, by stipulation, that if any juror is disabled by illness or other mental

or physical disability, so they could not proceed as a juror, that they would be willing to accept a verdict by eleven jurors.

Mr. Lanier: Or by ten.

The Court: Well, I never decreased it down to ten, always eleven.

Mr. Packard: I'll stipulate to eleven, but I want the record specifically to show that I will not stipulate to any number less than eleven.

Mr. Lanier: It's so stipulated.

The Court: All right.

Whereupon, the following proceedings occurred in open Court: [4]

The Court: The jury will now be permitted to go to lunch and, I assume, you have been in Court enough and on juries enough, to know that it is quite improper for you to talk about the case among yourselves or anybody else, or permit anybody to talk to you about the case or in your presence if you can avoid it. Be very careful about that and keep your mind free and clear of any possible outside influence until you've heard all of the evidence, so that you can confine your attention, when the time comes for you to consider your verdict, strictly to the evidence in the case under the law as given to you by the Court. Now you may be permitted to separate. Now, then, you gentlemen, do you want to argue that matter that we were talking about, before we go to the jury, that Motion, Mr. Packard?

Mr. Packard: Yes, I would like to be heard.

The Court: Well, suppose that you gentlemen come in, if you can get around to it, by a quarter of two.

Mr. Packard: That will be all right. [5]

Mr. Lanier: That will be satisfactory, your Honor.

The Court: And the jury will be back in the jury room until called after two o'clock. Get back at two and then we will call you as soon as we are ready for you.

(Whereupon, the hearing was adjourned until 2:00 o'clock P.M. [6]

Afternoon Session
April 8, 1958

In Chambers 1:55 o'clock P.M.

(Pursuant to adjournment, the following proceedings were had in Chambers, in the presence of the Court and all attorneys of record, and the reporter present:)

The Court: Have you your Motion in writing?

Mr. Packard: No motion in writing.

The Court: All right then, suppose you proceed.

Mr. Packard: First of all, before I make a Motion, your Honor, I would like to have a stipulation between counsel that, throughout this trial, at any time that matters may be taken up in Chambers, in the absence of the Jury, that any Motions taken up, or any matters which are heard in Chambers may be deemed held in open Court, in the absence of the jury. Is that agreeable—may we stipulate to that?

Mr. Lanier: I'm entirely willing to leave that to the Court. I have no objection to so stipulating. [7]

Mr. Packard: Well, the point I'm getting at, rather than go out and sit in Court and make my Motion in the court-room, in the absence of the jury, I've had occasions in my practice where someone will question as to whether a particular Motion is properly made when it was made in Chambers and not made in open Court, and I want—all these proceedings are held in Chambers, and this Motion which I intend to make is a Motion which should be made in open court in the absence of the jury and I don't want any question raised that we are not in open court.

Mr. Lanier: I'll so stipulate.

The Court: I've heard of such things, but nothing like that was ever pulled on me in any of my practice.

Mr. Packard: Then I do have a stipulation, gentlemen, that all matters, held in Chambers, may be deemed in open court unless somebody calls my attention to the contrary.

Mr. Lanier: It's okay. [8]

Mr. Packard: May the record show, your Honor, that at this time the Jury has been sworn to try this cause; that prior to the calling of any witnesses or the taking of any evidence in the case, the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, moves the Court for a dismissal as to the second cause of action of plaintiff's amended complaint, upon the ground that said second cause of action fails to state a cause of action as purported therein. I call the Court's attention particularly to the fact that there has been a fail-

ure on the part of plaintiffs, in their second cause of action, to make any allegation, or to allege, that they had given any notice to the defendant, Arnold L. Lewis, or to any of the defendants; that they are claiming a breach of warranty, either express or implied, oral or written. There has been a complete failure on the part of plaintiff to allege in her complaint that they have given notice to the manufacturer—the distributor—of this particular product which they have alleged to be a cold wave solution called "Cara Nome", and that under—I believe it's 1769 of the Civil Code of the State of California, and it's my understanding that [9] that has been adopted from the Uniform Sales Act and is in force and effect also in the State of North Dakota—that the law provides that when action is brought, based upon the breach of a warranty, that——

The Court: Either express or implied?

Mr. Packard: Either express or implied. —that the buyer must give notice, within a reasonable time, to the seller, of the alleged or claimed warranty upon which they are relying. And I pointed out to the Court the case of Vogel vs. Thrifty Drug Store, which is in 43 Cal. 2nd, reported at page 184. The Court, in discussing the Uniform Sales Act, also in discussing Civil Code, Section 1735, under which causes of action, suits for warranty are permitted, then discusses the pleadings, and in this case the Court held that statutory requirement of notice must be given by the buyer charging breach of warranty. Then citing Civil Code 1769, which I referred to. It's imposed as a condition

precedent to right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach. I may state to the Court [10] that this is a most recent case in our State on this particular point——

The Court: Give me the reference again please.

Mr. Packard: (Spelling) V-o-g-e-l—Vogel vs. Thrifty Drug Store, 43 Cal. 2nd 184. And, of course, this case is a decision by our highest State Court—the Supreme Court—and it shows that a Petition for Rehearing was denied on July 28, 1954——

The Court: I notice in one of the briefs, that you cite CA 2nd——

Mr. Packard: That's our District Court of Appeals, and our trial court is the Superior Court, and then a case is appealed from the Superior Court to the District Court of Appeals, and then you may petition for a hearing in the Supreme Court. In other words, I realize that your Honor is——

The Court: I looked under Circuit Court of Appeals——

Mr. Packard: Right behind you are our California Appellate Reports, and that's our intermediate report, and I know in [11] New York State their Supreme Courts are trial courts I believe, and sometimes people are confused, but the Supreme Court is our highest court.

The Court: I believe their highest court is the Court of Appeals, isn't it—in New York?

Mr. Packard: I think so, yes, sir. But, this case, your Honor, has thoroughly discussed this

question of notice of alleged breach of warranty, and it goes on and states that——

"The clear and practically unbroken turn of authorities established the doctrine of the requirement of notice to be given by the vendee charging breach of warranty as imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach."

And then they give citations, or cases, from Oregon, Connecticut, so forth. It says,

"The giving of such notice must be pleaded and proved" by the purchaser seeking to recover or defend for breach of warranty. And it cites 77 Cal. Corpus Juris Secundum, Vol. 66. I don't know whether your [12] Honor has read the case or not, but I think it very thoroughly points out further that the burden is upon the one claiming the breach of warranty to plead and prove notice within a reasonable time. Now, there's a case that's cited here, Whitfield vs. Jessup—a 1948 case—it's in 31 Cal. 2nd, 826. It so happened, your Honor, that that particular case was tried by my firm, and it was the first case on this particular point, of the giving of notice. There was a question as to, there must be reasonable notice, and in that case this young lady had been drinking milk put out by the Jessup Farms and she contracted undulent fever, and she didn't discover this undulent fever for a matter of six or eight months and then she wrote a letter stating that she contracted this undulent fever and that she was holding them responsible,

and so forth. The evidence in the case showed that she had been to many doctors and was under the impression she had influenza. It varied. But nobody could diagnose her condition. So the Court, in that case, said it was a question of fact as to whether the notice was timely because, after all, she didn't know she had undulent fever. We were granted a non-suit, it so happened, in the case, and went up on appeal, [13] and the Appellate Court said it was a question of fact under this particular case inasmuch as she didn't know what happened to her——

The Court: They sent it back for trial?

Mr. Packard: For trial. But there wasn't a question of giving notice, as in this case. They haven't given any notice of any kind. They've alleged in their complaint that they are claiming permanent damage to her hair by reason of this——

The Court: Does the complaint indicate when the material was used?

Mr. Packard: Yes. The complaint alleges that on February 5, 1955, she purchased from the Kensal Drug Company of Kensal, North Dakota, a bottle of said product of Cara Nome, and they go on to state that she used that; that she mixed it up as it said on the instructions and, that, as a result of the use of this particular product, she sustained damage and injuries. Now, that, of course, was three years ago, and I believe the case—I'm not certain whether this case discussed the particular [14] point, but the purpose of the Code Section, our Civil Code, for the giving of notice is two-fold,

so that producers and manufacturers of products similar to this product, they are saying here, have an opportunity to maybe withdraw from the shelf——

The Court: What does the Code itself say?

Mr. Packard: Can I get a Code, your Honor? I think there is one out here——

Mr. Bradish: May I just inject into the record the fact that the initial complaint in this matter was first filed on February 19, 1957, and that the amended complaint——

The Court: That was the first notice any of you had, I suppose——

Mr. Lanier: Oh, no, your Honor, no.

Mr. Bradish: (Continuing) The complaint was first filed on February 19, 1957, and the amended complaint bears a date of affidavit of service on the attorneys then of record, of April 1, 1957. So, insofar as the pleadings are concerned, and insofar as the official court records reflect, that [15] was the first notice——

The Court: What was the filing of the first pleading, the month——

Mr. Bradish: February 19, 1957, which was some two years after the alleged incident took place.

Mr. Packard: 1769 of our Civil Code, reads as follows:

"Acceptance Does Not Bar Action for Damages." In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer

shall not discharge the seller from liability in damage or other legal remedy for breach of any promise or warranty in the contract to sell, or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor". That is our Code Section and that is followed after the Uniform Sales Act.

The Court: Is that the same as your Statute?

Mr. Lanier: The same as ours, your Honor. [16]

Mr. Packard: And, then, like I stated to your Honor, these cases—or case—the one I stated to you that our firm handled was the first one in California on the question. We got a non-suit. The Judge held that there was not reasonable notice given, because six months had elapsed, but the Appellate Court held that this lady didn't know that she had this condition until about six months had elapsed, and so, therefore, it was a question of fact for the jury to determine whether the notice was reasonable, but in our case at bar—this case—there has never been any notice alleged in the complaint as having been given. They've alleged in their complaint, when they filed their complaint, that there was a breach of warranty, but they haven't alleged that they have ever given notice. Like I state, your Honor, the purpose of the law is so that the manufacturer can take whatever steps are necessary to ascertain and determine these facts, and I feel that a Motion to Dismiss should be

granted. The Court, I notice here, your Honor, states:

"One of the purposes of the provisions in the Uniform Sales Act was to * * * the harshness for the common law rule in some states that the mere acceptance by, or passage of, title to the buyer of the goods constitutes [17] a waiver of any and all remedies for breach of warranty, at the same time gives the seller some protection against stale claims by requiring notice. The Sales Act, on its face, clearly applies to the sales of foods—this is a food case—but certainly there is an implied warranty that the food is fit for human consumption under the Statute dealing with the law of the sale of goods. It is accepted for the sale of foods",—well, there's no question there's a sale of goods here—and comes within 1735 of the Civil Code, and 1769 providing that notice must be given, and I submit to the Court that I feel this case is controlling.

The Court: Does Rexall join in the motion?

Mr. Bradish: Yes, I do, and I would like to cite the court to a couple more cases which seem to be in point. One case is where the buyer of a safe failed for a period of fifteen months to give notice to the seller of his intention to hold the seller for breach of warranty and the court held that, as a matter of law, fifteen months was unreasonable and precluded the buyer——

The Court: I can't remember your associate's name. [18]

Mr. Packard: Bradish.

Mr. Bradish: Like "Radish" with a "B" in front.

The Court: All right, Mr. Bradish, I'll try to remember that.

Mr. Bradish (Continuing): This is a fifteen months' period which the Court held, as a matter of law, was unreasonable, and precluded recovery by the buyer. Then there is a recent case——

The Court: What was that citation?

Mr. Bradish: Davidson v. Harrington, Hall, Marvin Safe Company, 131 Cal. App. 2d. Supp. 874, and it is also cited in 280 Pac., 2nd, 549. Then there is a 1956 case entitled Burkett v. Dental Perfection Company, 140 Cal. App. 2nd, 106, which says that where the complaint contains no allegations concerning notice of a breach of warranty of sale, this is——

The Court: What is that case——

Mr. Bradish: 140 Cal. App. 2nd, 106. ——this is fatal to an action for a breach of warranty. Now that case is subsequent to the Vogel case which I understand was decided in 1955, and merely confirms the ruling in the Vogel case.

Mr. Packard: May I state this further, your Honor. The case of Bailey Trading Company vs. Levy. This case is cited in the Vogel-Thrifty Drug Case. The case states—and that is reported in 72 Cal. App. at 339—and it states that "Where an action is founded on a statutory right, or a right deducible wholly from statute"—and that's the situation here—"the plaintiff must, by his complaint, bring himself squarely and clearly within the terms of the provisions of the Statute upon which he relies, or must rely, to state a cause of action. In other

words, where a party relies upon a general or a statutory warranty for a recovery, the terms thereof, and the facts from which the damages for its breach are to be inferred, must be set forth with reasonable certainty." In other words, they hold that a person, when relying upon a statute must plead themselves within the statute, and that is the very point we are claiming here, that they had failed to plead themselves within the statute in that they had failed to allege that they had ever given at any time any notice to any of the defendants in this action that they were relying upon a breach of warranty, as provided for under our Code, and I submit to the Court [20] that a Motion to Dismiss should be granted as to that cause of action based upon the second cause of action.

Mr. Lanier: May it please the Court. First of all, let's get back in the Federal Court. I want to answer counsel four ways, one very briefly. The Vogel case and all the other cases in the State Court—while I don't think this has anything to do with this lawsuit, but I want to state it briefly—pleading in the State Court of California has nothing to do with pleading in the Federal Court—rules or statutes or anything else. But, No. 1, all of the cases——

The Court: Of course substantive law does; the statutes of course are substantive law.

Mr. Lanier: The proof eventually, which will have to come out during the trial of course will have to conform to the statute, but the pleading of course has nothing to do with California decisions or statutes. They should be Federal decisions. But,

No. 1, all of these cases, your Honor, are between seller and buyer. The statute itself is between seller and buyer. The local druggist sells. To have the action against the local druggist, who is the [21] seller of the product, the notice under the statute must be given in order to hold him. This, of course, isn't between seller and buyer. This is a warranty, not between a seller and a buyer, but between a manufacturer and a buyer. I don't even think the statute even applies to it, but I'm not going to argue that at any length at all because I don't think it's necessary. Second, there is a pre-trial conference order made here, as a matter of fact dictated and submitted by the defendants in this case. No question of improperness of pleading, and a legal question raised in a pleading is raised at the time of the pretrial conference order, hence it would come too late to raise it at this time. There is a question raised in the pretrial conference order whether, as a matter of fact, they had reasonable notice or not, but not as a matter of law insofar as the pleadings are concerned. I think that's material. No. 3, and the thing that I think is controlling. That, under Federal Rules of Civil Procedure, Rule 882 is very clear. Of course this has been uniform and universal throughout. However, 882 of the Federal Rules, and as further discussed in Section 441, Barron & Holtzoff—no that's under Section 255 of Barron & Holtzoff. The section of course, 882 of the Federal Civil Rule, states only "A short and plain [22] statement of the claim showing that the pleader is entitled to relief is required." "The intention of the rule"—this

is Barron & Holtzoff and universal throughout the Federal Courts—"The intention of the rule is clearly to avoid technicalities, fair notice and general indication of the type of litigation involved." The liberal construction under 8F that no relief can be granted, is only a question where, if a person should grant a motion such as now has been made by counsel, the only place, which is discussed in Barron & Holtzoff, that such a motion could be granted, is where it becomes obvious under the pleadings that regardless of what the testimony was, no relief could be granted under any possible given set of facts. It's just that clear and just that simple. Under the new rule, the only requirement of any pleading is that it sets forth in a general way what the theory of the lawsuit is and what it's about. Now this goes further. In other words, my position on that is this, your Honor, counsel is arguing a matter of law, not a matter of pleading, he is arguing a matter of proof, not a matter of pleading. Had we only alleged in our complaint (1) "Defendant is guilty of a breach of warranty," we would have sufficiently alleged all necessary allegations under 882, but we went farther than that. We even specifically pointed out that they had advertised and [23] that we relied upon that advertising. The mere fact that we don't state in there that we have given notice is totally immaterial insofar as the pleadings are concerned.

The Court: Well, let's go back to the substantive law just for a moment. What position do you take on the necessity of notice?

Mr. Lanier: I think the necessity for reasonable notice is unquestionable under the statute. I think our proof is going to have to show that the notice given was reasonable.

The Court: Don't you think that anything you have to prove like that should be stated—pleaded I mean—as part of the case?

Mr. Lanier: No, I do not, your Honor. I don't think that under 882 under the Federal Rules of Civil Procedure, which is the pleading rule itself, I don't believe we have to plead anything but breach of warranty. I don't think that we have to say in what way; that they advertised; that we relied upon it; that it was not fit for the general purpose for which it was sold, whether it's an express warranty or an implied warranty. It just isn't necessary under the Federal pleadings. It's just like the negligence cases, you can come in now and say "he done it," "he done it [24] negligently."

Mr. Bradish: If 882 was to have that meaning, it would in essence state that the Federal Court would not have to comply with the substantive law of the jurisdiction wherein they were sitting——

Mr. Lanier: Counsel, if I might finish first.

Mr. Bradish: All right.

Mr. Lanier: I listened all the way through on yours. If I might finish——

Mr. Bradish: I thought you were. I'm sorry.

Mr. Lanier: If we were worrying about substantive law, we are worrying about a question of proof and compliance of what is necessary, and there, of course, we would be fatally effective. Were we not

to have ever given them any notice and brought a lawsuit three years later, of course we would be fatally defective, but that is a matter of substantive law. This is a matter of procedural law. This is pleading which is set forth by the new Federal Rules of Civil Procedure, and they can bring these cases all they want to, they can't give me a single case in Federal Court where, under the pleadings— [25] any pleadings have to be more specific, unless I'm wrong, and they don't and they can't. Now, let's suppose, in going to the final point on this, your Honor, let's suppose that we weren't specific about it, let's suppose that the Federal Courts are going to require the technicality of stating in a pleading, which is completely out of line, that we had given notice. Now then, even after judgment was entered, to conform to the proof at the close of the trial the Court certainly, under Rule 15, has the power to allow the amendment to include it. Let's go back again to Barron & Holtzoff on that for a moment. Section 441. Under the rule "Leave to amend should be granted freely when justice so requires, and the adverse party will not be prejudiced thereby. The right to amend a pleading by leave of Court is controlled by this Rule," and here is what I want to point out to the Court, "and State Statutes or rules have utterly no application. In ruling on the Motion to Dismiss, if it appears that the objection could be obviated by amendment, the Court may permit the amendment and deny the motion." Now that is my four points, your Honor.

The Court: My understanding of the Rules of

pleading in the Federal Court is not quite as simple as you conclude Mr. Lanier. Rather, that the pleading, where there's any question raised, by Motion to Dismiss, or otherwise, that the pleading should, [26] either on its face or by amendment, if they want to amend, show all the essentials required in order to prove the case. In other words, if there is a notice required by substantive law, I think you ought to plead it. In other words, where it's brought to the attention of the Court—I think it is true that there's been no motion to dismiss—and the question comes up during the trial, I think you would be permitted to amend and to comply with the proof; but here it's brought to the attention of the Court as a matter of substantive law, and it's not in your pleading, and I'm inclined to think that if you would want to rely on that, as I assume you do, that you should amend your pleading to comply to that rule of substantive law. Here is an example of what I'm getting at, Mr. Lanier. In our State and in negligence cases, the plaintiff, in order to recover at all, has to allege and prove not only negligence on the part of the defendant, but freedom from contributory negligence on the part of the plaintiff. When the Federal Rules were first adopted, the plaintiffs thought, well, now, contributory negligence is made an affirmative defense by the rules so I will not need to allege that anymore. Well, a case came up on a Motion to Dismiss, just like this, and the pleader stood on his complaint, he hadn't alleged freedom from contributory [27] negligence. I held that it was a matter of substantive law under the law of Illinois, not a

matter of procedure at all, and that since it was a matter of substantive law it had to be pleaded in order to make out a case. In other words, you can prove all day in Illinois if you want to that the defendant is negligent. Unless you also prove that the plaintiff was free of contributory negligence, you can't recover because that's the law of the state, and here apparently it is that the notice is an essential part of the case and, therefore, I would suggest, if you want to be able to put in the proof, now that it has been called to the attention of the court, that there was a notice given by your client and that you amend your pleading to comply with that——

Mr. Packard: May I be heard just briefly?

The Court: I don't think there is much further to be said.

Mr. Packard: In this case, it goes on to say, and it's very short—"It is settled in this State the implied warranty of fitness imposed by sub-division (1) of Section 1735, the Civil Code, applies to the sale of food of the type here involved. The plaintiff urges that she should have been permitted to file her proposed amendment to separately state the implied warranty theory, and that [28] in any event all of the facts necessary to support a recovery upon that theory, as well as upon the theory of negligence, was set forth in the amended complaint upon which they were at trial."

And the Court says:

"But in making this argument plaintiff overlooks an element essential to stating a cause of action for

breach of the implied warranty. In other words, an allegation the plaintiff gave notice of the breach to defendant within a reasonable time." Now, I feel that to permit them at this late date to amend would be too late and that the motion as to that cause of action should be dismissed.

The Court: I disagree with you on that.

Mr. Lanier: Your Honor, so I can get my record complete over here. First of all, may the record show an exception to the ruling of the Court; and, secondly, I now move the Court to amend the amended complaint herein and particularly under cause of action No. 2, paragraph 1, of said complaint, to put a semicolon at the conclusion of the sixth and last line of said paragraph 1, and to add the following sentence: [29] "that reasonable notice of said injury was given to the defendants herein."

Mr. Packard: Let me be heard before you rule, your Honor.

The Court: All right.

Mr. Packard: Well, I feel that that is uncertain. Of course, we're not in a position to make a motion at this time to make more definite what they mean by "reasonable notice"; also uncertain as to which defendants or any defendants they gave notice. I think if they are going to make proof at the trial of this action that they gave notice, they certainly must at this late date know the date on which they gave the notice and to whom they gave notice, and I think if the Court is going to permit them to amend their complaint by interlineation at this late date, that we at least should have the benefit of

knowing when they claim notice was given and to whom notice was given.

The Court: Any reason why you can't give that information?

Mr. Lanier: No, there isn't any reason, your Honor. The only thing, [30] I'd like the record to show the type of spurious objection that this is, because counsel and his defendants are just as aware of when the notice came as we are. There's nothing new and surprising in this at all. They have the letters from us. They have retained lawyers in North Dakota in the year 1955. Not '56, '57 and '58. They retained them. We sent in '56, even, two years ago, at their request, we sent the plaintiff to their specialists, one of the best in the country, Dr. Michelson of Minneapolis. All the notice is there, and they have every bit of that record that we do.

Mr. Bradish: If the Court please, the first time any mention of breach of warranty was involved in this case was in April of 1957 when the first amended complaint was filed. The complaint itself filed in January '57 made no mention of warranty at all.

The Court: Well, so far we're right on our procedure. I will require you, Mr. Lanier, to give them the date of the first notice you have given.

Mr. Packard: And after that is inserted we may have further motions. [31]

The Court: Well, the motions are coming awful late.

Mr. Packard: I believe these motions, your Honor, are motions that can be heard at any time,

even on appeal, and this goes to—like in our State Court—a general demurrer. They haven't stated a cause of action, and in the Federal Court I understand the procedure is to make a motion to dismiss because the complaint fails to state a cause of action.

The Court: I'm not going to hear them now.

Mr. Packard: Then you're refusing to hear my motion to dismiss?

The Court: I don't know what your motion is, but the motions are coming too late. The jury is impaneled and I want to proceed with the jury trial.

Mr. Packard: Well, I would like to make my record, and is counsel, before we proceed with the trial, going to allege in the complaint when this notice was given? I would like to make my record on this case, your Honor, so I'm protected. [32]

The Court: I am requiring him to give you that information.

Mr. Packard: Are you giving him leave to amend his complaint at this date to so insert by interlineation the date upon which notice was given? I'd like to have the Court rule.

Mr. Lanier: I believe the record shows that the motion was granted and he is asking the court to now ask me to give you the dates and I will now give them to you.

Mr. Packard: Well, I don't feel that, for the record, it's sufficient for counsel merely to give me dates. I think that it should be in the record as to——

The Court: Well, make your offer and I'll answer it.

Mr. Packard: Well, your Honor hasn't ruled upon my motion yet——

The Court: Your motion is denied.

Mr. Packard: (Continuing) ——to dismiss on the ground that they have failed to allege that there has been any notice given, or alleged in their complaint as to the second cause of action. [33]

The Court: The court has denied the motion but required the plaintiff to amend its pleading to show what this allegation is concerning such a notice. Now he has amended his pleading to show an allegation of reasonable notice to, I assume—he said to the defendants—he means to each of the defendants. Now then, in addition to that I have asked him orally, and to orally give you the information that you asked regarding dates, and I think that's all that the situation requires.

Mr. Packard: Then, as I understand, the complaint—I would like to know what he is putting in his amended complaint at this time.

Mr. Lanier: It's dictated into the record, counsel.

Mr. Packard: All right. Now, I would further like to make a motion for dismissal of this action as to the defendant, Arnold Lewis, doing business as Studio Cosmetics Company, on the ground and basis that there is no showing of any privity of contract and the complaint, upon its face, alleges that plaintiff purchased from Kensal Drug Company, Kensal, North Dakota, a bottle of said Cara Nome; that they have not alleged on the [34] face of the complaint

any fact which would show that there was any privity of contract between the plaintiff and the defendant, Arnold Lewis, doing business as Studio Cosmetics. As you will recall, counsel when he just stated his four grounds stated that they are not claiming any privity; that they went into this drug store in North Dakota and that this provision of our civil code and the Uniform Sales Act relative to Section 1735 of our Civil Code, providing that there is certain obligations upon a seller to a purchaser and so forth, he said that he isn't claiming that any of the defendants in this action were sellers. Now if that's his position — and I feel from reading the complaint in this action, it's quite evident that the defendant Arnold Lewis did not sell this product to the plaintiff—we are entitled to a dismissal as to the second cause of action based upon warranty in that it's quite evident there is no privity of contract between the parties, and certainly an action based upon warranty has to stand upon a privity between the parties, or a contract to sell between the parties, and I submit to the Court that our motion to dismiss should be granted upon those grounds. [35]

Mr. Lanier: Now, counsel is asking me to plead a conclusion of law which is only going to be a question of fact from the evidence that comes out and the decisions as to what constitutes—what he is asking me to do now is to plead a conclusion of law, that there's privity between the parties.

Mr. Packard: No. He alleges right in the complaint that the plaintiff purchased from Kensal

Drug Company, Kensal, North Dakota, a bottle which had been obtained from defendants. "Which had been obtained from the defendants," now that certainly implied that they had obtained a solution from the defendants who are before the Court here. They haven't sued Kensal Drug Company of North Dakota. He just stated that in his argument, that we should not invoke the sales act——

The Court: Have you got your motion made?

Mr. Packard: Yes.

The Court: Your motion is denied.

Mr. Bradish: Your Honor, may I have—will Mr. Lanier be kind enough—— [36]

The Court: I have a very deep feeling that you are taking unfair advantage of this Court by not ironing all of this out at the preliminary hearing on this thing when Judge Mathes had this all in mind and had an opportunity to consider everything. I don't believe that this is the time to catch this court unapprised of what the issues are, almost, and make all of these technical or meritorious motions you like——

Mr. Packard: Well, I want the record to show that I do not consider I'm making technical—but I'm making my motions based on the law, and I feel that they are meritorious and I feel——

The Court: If you think you are going to try this case by trying to catch this court up on errors, why I want you to be just a little fair about it all.

Mr. Packard: I may state to the court — maybe it's my fault—that the first time I looked at this file is when I got it ready for trial. My clients wanted

me to try it and someone else was handling it, and I feel that I'm entitled to raise all the legal matters—— [37]

The Court: Weren't your men represented in that pretrial hearing?

Mr. Packard: Yes, but I mean the Court has indicated——

The Court: Well, you are the trial lawyers, and you come in here and raise all these questions, that ought to be raised preliminarily, at the trial, and I don't think that's right and I don't think it fair to the Court and I don't think it's fair to your client even.

Mr. Packard: Well, I'd like to state——

Mr. Lanier: It certainly isn't fair to opposing counsel so far as I'm concerned.

Mr. Bradish: Gentlemen, may I just please have, in compliance with your Honor's request, may I have Mr. Lanier read into his amendment to this complaint the dates upon which notice was given.

The Court: No. I won't require him to put it in the amendment. I'll require him to give you the date. [38]

Mr. Lanier: The first notice was given to you July 5, 1955.

Mr. Bradish: Given to whom?

Mr. Lanier: The letter is addressed to Rexall Drug Company, Department F, 8480 Beverly Hills, Los Angeles 54, California.

Mr. Packard: Did you ever give notice to Arnold Lewis at any time, sir?

Mr. Lanier: The next is November 21, 1955, to

Mr. Walter D. O'Connor, of the law firm of Topless, Harding, Wagner & Gliden, 3440 Wilshire Boulevard, Los Angeles 5, California.

Mr. Bradish: May the record show that that is not a law firm, and that is not a defendant in this action.

Mr. Lanier: In re Sandra Nihill. In response, and also on September 7th—in response to a letter from them stating that they represented Rexall Drug Company and Cara Nome products and had received the notice—and that's from an attorney—stating that he represented them, from Jamestown, North Dakota, on December 3, [39] 1955. Now, if these people don't represent you that of course is a matter of proof. We have dealt in good faith with them. I don't know anything about that. A letter from Rexall Drug Company of August 16, 1955, signed by a Miss Roney, reference to Nihill vs. Rexall Drug Company, referring to our letter of August 8th——

The Court: Do you have anything to Lewis, Mr. Lanier, or anyone representing him?

Mr. Lanier: So far as I know only that it comes from Cara Nome, but from Lewis themselves, no, except by indirection that they indicate that they are part of it, but not from Studio Cosmetics direct. Our correspondence and notices were between us and Rexall.

Mr. Bradish: You say there was a letter on July 5, 1955?

Mr. Lanier: That's the first one.

Mr. Bradish: And is that based upon any receipt

of registered mail or anything like that, or is that just based upon a copy that you have—— [40]

Mr. Lanier: Based upon a copy right now. We wrote you. You're asking for the dates and I am telling you.

Mr. Packard: I don't wish to take up the Court's time and I feel that the Court felt—we haven't even commenced this case—I am raising certain issues in the case that I should not properly raise and I just want the Court to know that I am making these motions in good faith and I feel my grounds is good and I feel that the Court has already taken the position that I am trying to raise every technical ground and take people by surprise, which I am not, because in the pretrial order it shows that one of the things we are relying upon is this question of notice and I feel that that's vital to their case and I feel that——

The Court: It apparently was considered an issue in the pretrial hearing.

Mr. Packard: Beg pardon.

The Court: It was at issue in the pretrial hearing, made one of the issues in the case. [41]

Mr. Packard: It was one of the contentions, yes, that's right.

The Court: One of the issues.

Mr. Packard: Yes, that's right, but I am submitting to the Court that the fact that it was made one of the issues certainly doesn't mean that we can not rely upon the pleadings.

The Court: I think he is entitled to amend.

Mr. Packard: Very well. I feel that there will be other times when this matter will be raised.

(Whereupon, the Court, Counsel for the respective parties, the reporter and clerk proceeded to the courtroom, and the following proceedings were had in open Court:)

The Court: State the case for the plaintiff.

Mr. Lanier: May it please the Court, Members of the Jury panel. It is now my opportunity to be able to state to you under our jurisprudence what it is that we expect to prove so that you can better follow the case as you go along. I want to give you a brief summary of what it [42] is that we expect to prove so that you, as jurors, can follow the testimony better and apply that testimony to the law which later will be given you by the Court. Now, first of all, I am P. W. Lanier, Jr., from North Dakota, where I practice law in Fargo, North Dakota, and seated at my counsel table with me is James G. Rourke, who practices law in Santa Ana, California, and is associated with me in representing Sandra Nihill. Sandra Nihill is the little girl seated there in the middle, in the front row. Her mother, Mrs. Nihill, is on the far right. Sandra Nihill is the plaintiff in this case. The testimony will show you that Sandra Nihill lives on a farm about three and a half miles out of a little town in North Dakota, known as Kensal, North Dakota, a town of approximately three hundred or three hundred and fifty people. The proof will further show that there is located within the town of Kensal, North Dakota, a Rexall Drug Store. It has been

there for several years. The proof will show that Mrs. Nihill and her daughter Sandra are acquainted with that Rexall Drug Store and have bought drugs and cosmetics from Rexall—the Cara Nome line—there for some good time. The proof will show that Rexall Drug Stores—that the Rexall Company—is a Delaware corporation having its [43] principal office here in Los Angeles, and handles Cara Nome cosmetic products; that one of them is a pin curl home wave under the tradename of "Cara Nome" and sold by Rexall Drug Company. The proof will show that Rexall Drug Companies under a national advertising program advertised Cara Nome cosmetics, which, among them, is this pin curl home permanent as one of their Rexall products. The proof will show to you that at the time when Sandra was thirteen years of age, in about February 5, 1955, that Sandra and her mother went to the Rexall Drug Store in Kensal, North Dakota where they bought a Cara Nome Rexall Pincurl Home Wave; that they bought the set and the kit, as the testimony will show you, in reliance upon the national advertising that it was safe, that it was faster, that it was easier, and that, upon that reliance, and depending upon the Rexall name and the Cara Nome, they purchased it. The proof will show you that they took it home and a Mrs. Briss—at that time, her husband has since deceased—that a Mrs. Briss, who had applied many home waves to the neighbors around in this area, in a rather closely-knit community, that she came over in the evening and that Mrs. Nihill and her daughter Sandra and Mrs. Briss

were together [44] at the time that the wave was applied; that Mrs. Briss primarily applied the wave and that Sandra and her mother, Mrs. John Nihill, assisted in the timing; that it was done in the kitchen of their farm home; that there was an electric clock upon the wall. The testimony will show you that the directions within the Rexall Cara Nome kit were carried out meticulously to the "enth" degree; that all the timing was done carefully and that primarily it was Mrs. John Nihill's function and Sandra herself also assisted in it. The proof will show you that Sandra at the time was in the eight grade; that she had just about, a month before, had pictures taken of her for her eighth grade picture by a photographer who come around in that rural area of our country and takes group and grade school pictures for graduation, and that picture of how Sandra was, about a month before the application of the wave will be shown and will be put into evidence for you. Also the pictures taken immediately thereafter and in about June, July of that year, of the final results will be put into evidence, so you can see them and so you can compare them, as she is now today. The proof will show that Sandra and her mother and others, by deposition—I might add that the deposition only of Mrs. Briss will be here, taken in North Dakota. Because of the expense [45] involved naturally much of our testimony unfortunately is going to be by deposition because of the distance involved between North Dakota and California—the deposition of Mrs. Briss will be read in evidence to you, the third person

present, actually was in the kitchen at the time that the home permanent was given. Then the proof will show further that starting about week after the application of the cold wave solution after having followed all of the directions meticulously, that Sandra's hair began to come out by the handfuls and the comb-fulls as she combed her hair; that this was a gradual condition, the proof will show you that this wasn't a spotted, down to the skin, like the hand, for instance, condition, but that the hair came out generally all over the head, and broke off all over the head; that she watched this condition and of course expected that it was going to cease and it came out slowly and over a period of weeks until finally—and the testimony will show you—that they became alarmed and on February 28th, some three weeks after the actual application itself and some, something like a little less than two weeks of constant falling out of the hair, they went to their local doctor in Kensal, who is the general practitioner in Kensal, North Dakota, for the surrounding farm area and small towns around there, [46] Dr. Martin, who had been practicing there for some years; that upon becoming alarmed that Sandra was taken to Dr. Martin. The deposition of Dr. Martin, taken also out in North Dakota will be read to you for the same reasons that I have stated before, so that the complete findings and opinion can be brought to you in this case; and on February 28th and after making the examination, he made a prescription, the proof will show, and his testimony will show that upon the finding of certain inflamation and scal-

ing, he made a prescription of a drug known as selsum, for her to use in applying it when she went home. He told her to apply that now for the next two or three weeks and see what the results were. Upon the application of selsum following the doctor's direction, she went on until practically graduation time. By graduation time about half of the remaining hair, the proof will show you, had been gone, to the point that when she graduated from the 8th grade, she had to wear a scarf or something because she was already beginning to become embarrassed because of the condition of her hair, and that by that time of course they were also becoming alarmed. The proof will show you that about three weeks thereafter she, in her Confirmation in Church, her exercises, that by that time which was then in the [47] latter part of June, she had become almost totally bald, and that there was very little hair remaining to the point of where she almost wouldn't appear in public, and on July 6th she went back to Dr. Martin and Dr. Martin immediately, upon seeing her condition at that time, contacted the nearest large clinic, which was in Jamestown, North Dakota, a town of some twelve thousand people, and got hold of a Dr. Sorkness there, the testimony will show you, and requested where in his opinion—Dr. Sorkness' opinion—the best dermatologist in that section of the country could be found. Dr. Sorkness, as the proof will show, referred him to Dr. Melton who is a skin specialist with the Dakota Clinic in Fargo, North Dakota. The little girl was sent in then to Dr. Melton and he examined

her and kept her under his treatment until about the first of October. The testimony will show you that at that time she was practically devoid of hair except for a growth at the nape of the neck and a little hair on the back of the head. The proof will show and the testimony will show that there was and is practically no treatment for it. The proof will further show that by the testimony of Dr. Martin and by the testimony of Dr. Melton that it was the application of [48] the hair wave solution which caused the original loss of hair. Along with that, also, and since having arrived here at Los Angeles for this trial, she has been thoroughly examined by one of your local dermatologists here in this city of Los Angeles. He will testify as to her condition and as to the permanency of this condition, this hair condition, now over three years since having been lost, remaining practically the same as it has. The testimony will be put onto the stand by both doctors and others of the effect that this has had upon the personality of Sandra. The expense that has been incurred and will be yet incurred throughout her life, will be testified to for you. Furthermore, the depositions of two other ladies in the Kensal area who made purchases of the same Rexall Drug Store of the same Cara Nome home wave product, of the fact that they lost their hair at approximately the same time——

Mr. Packard: Just a moment. I object to this argument. It's improper, I don't believe it would be admissible in evidence and that is not the testimony of these witnesses.

Mr. Lanier: If the Court please, I am only summarizing what we are [49] going to prove and the depositions have already been taken.

The Court: I'm rather of the opinion that that will be admissible——

Mr. Packard: May we approach the bench, your Honor?

The Court: Yes, you may.

(Thereupon, counsel for the respective parties and the reporter approached the Bench and the following proceedings were had out of the hearing of the jury:)

Mr. Packard: These depositions were taken and I believe the pretrial order shows, there was objection made on behalf of the defendants, that there is no proper foundation laid for the use of these depositions, and I believe for counsel to refer to it at this time would be improper because I don't believe it's admissible. Secondly, these people did not lose their hair, their hair broke off, there's no evidence that their hair fell out and I think it's improper——

Mr. Lanier: My position, your Honor, is that if I am misquoting any testimony or if I am unable to show what statements I am [50] making in the opening statement, I take my chances.

The Court: The objection is overruled at this time.

(Thereupon, the following proceedings were had in open Court:)

Mr. Lanier (Continuing): By deposition form, the testimony of a Mrs. Don Carlson and a Mrs.

Carl Carlson, who are mother and daughter-in-law, of these purchases, without repeating myself, which I was speaking of at the same Rexall Drug Store, and the same products, but after having been used that their hair also broke off. They will testify for you in the deposition of a brown, strawy hair to the point of where, in order to even it up, they had to go into this nearest larger little town, Jamestown, go to a beauty shop, have it cut off down level with their heads in order to finally get their own head squared away after use of this product. The testimony will also show you that in their cases, it was not permanent; that the hair, as far as they were concerned, after this breaking off, and this burnt condition or whatever it was, that the hair did grow back and did restore itself to normal. The testimony will show you that in Sandra's case she never did recover from it. The testimony will show you further that a doctor— [51] testimony by a local skin specialist here, from out in the Beverly-Hills Hollywood area, will be on the stand for you and will explain exactly why it was that her hair has not come back and why she will have to live with it the rest of life. Secondly, there will be put on the stand for you one of the leading wig and transformation manufacturers in the United States, located also in Hollywood, who will testify to the fact that she has examined Sandra, that she has made measurements for transformations, what those transformations will cost, how long they will last and what the expense will be monthly and yearly for Sandra throughout the rest of her life in order to

maintain a transformation to give her the normal girlish or womanish look later, as she grows older. The testimony also will be submitted to you of a life expectancy of Sandra of some forty-five years, at the age of thirteen, as to how long she is going to have to continue this yearly, constant treatment of hair wigs and transformations. The testimony also was taken by deposition, the proof will show you that, at the request of the defendant some two years ago, Sandra was sent to a Dr. Michelson in the city of Minneapolis, Minnesota, at the request and at the expense of the defendant for the purpose of having her examined for them. The deposition, at the instance of [52] the defendant, of Dr. Michelson, was taken. I presume—I do not know—that Dr. Michelson's testimony will go in on deposition——

The Court: I think you better confine yourself to what you expect to prove.

Mr. Lanier: Your Honor, I will. If not, we will put in the cross examination of Dr. Michelson in the event that they do not, so that you will have at least a portion of Dr. Michelson's testimony, who was examined by them. Now, as a result of this, and as a result of what the testimony will disclose to you, and at your hands we are asking for the sum of $250,000 for the damage that has been done to Sandra and for the expense she is going to incur the rest of her life and with that I feel that I have given you enough of what the case is about, what we intend to prove, so that you can follow our proof as we go along.

Mr. Lanier: At this time, may it please the Court, I would like to call for cross examination under the Federal Rules Mr. Thomas Stark, Assistant Manager of the Rexall Company. [53]

Mr. Packard: I may want to make an opening statement myself, counsel, at this time.

Mr. Lanier: I'm sorry. I didn't know, I'm sorry.

Mr. Packard: May we approach the Bench, your Honor?

The Court: You may.

(Whereupon, counsel for the respective parties and the reporter approached the Bench, and the following proceedings were had out of the hearing of the jury:)

Mr. Packard: At this time, defendant Arnold L. Lewis, doing business as Studio Cosmetics, moves the Court for a dismissal upon the opening statement as to the cause of action based upon negligence, on the ground that counsel has failed to state to the jury in his opening statement that he intends to show any negligence in the compounding and manufacturing of this material whatsoever. True, he stated they relied upon advertising in publications and so forth, and they followed directions and so forth, upon which he can go to the jury on the issue of warranty, but he hasn't stated anything to the jury as to the cause of action based [54] upon negligence, which would properly permit the case to go to the jury. I submit the motion should be granted.

Mr. Bradish: I join in that motion, your Honor.

The Court: Motion is denied.

(Whereupon, the following proceedings were had in open court:)

Mr. Packard: At this time, may it please the Court, counsel and ladies and gentlemen of the jury: As you realize—Mr. Lanier has stated to you what they expect to prove on behalf of the plaintiff in this action—at the outset of the trial, both parties, if they so desire, may state to you what they expect the evidence to indicate to you insofar as their case is concerned. The purpose of the opening statement is so that we, as attorneys, knowing what our proof will be, can outline for you what we expect the proof will be and the evidence will be, as it comes in. We more or less give you an outline setting forth the case and our position. Any statement which I make or any other counsel makes in this action, shall not be considered by you to be evidence. The only evidence will come to you from the witnesses who take the stand. Now, I expect the evidence in this case to indicate—I represent [55] Mr. Lewis, the gentleman seated at the end of the table there, he is one of the defendants and he is doing business as the Studio Cosmetics—that he has been in the beauty supply business since 1929; that in the year of approximately 1936, he went into the cosmetic manufacturing business, and around in 1937, they first manufactured these home permanent kits; I believe at that time, they were a different type of home permanent kits in the cold wave, but in approximately 1941, or about the time of the commencement of the war, the cold wave permanent kit came on the market. At that time, they manu-

factured these cold wave home kits and his kit is known as Cara Nome—that is really a tradename for Rexall—and he manufactured this product which was distributed by Rexall. The evidence in this case will indicate that the formula for the manufacture of these cold wave kits is more or less standard; but the people who supply and furnish the various ingredients to various cosmetic manufacturing houses, supply the proportions and then they are measured by chemists employed by Mr. Lewis at his plant. Then this solution is bottled, put up into certain kits, and then they are distributed by the Rexall Drug Company. I believe the evidence in this case will indicate, ladies and gentlemen, that a particular batch of cold wave solution which will be referred to as Lot No. 181, was manufactured sometime [56] in October of 1954 by Mr. Lewis, doing business as Studio Cosmetics; that that particular lot was distributed over various parts of the country. I believe the evidence will indicate that a certain portion of it went to Chicago, some went to Georgia and, apparently from there, this particular lot 181 found its way to North Dakota; that subsequently the plaintiff in this action—her mother—purchased some of this cold wave solution, Lot No. 181 in a home kit of Cara Nome pin curl permanent. We will offer in evidence, ladies and gentlemen of the jury, the fact that out of these lots certain samples are maintained; we have had an analysis made of lot 181 by a local chemist here; that he has submitted a report and will be here in court to testify to you that the chemical com-

position of the particular batch from which the plaintiff received her home permanent met the standards and was within normal limits of the various cold wave lotions put on the market by producers of such a product in this country. We will show that they used, and you will hear testified, thioglycolate acid as one of the component parts. The evidence in this case will show that various types of cold wave solution vary in their content from three-fourths percent up to 10 percent of thioglycolate acid, depending upon the type [57] of wave; the evidence will show that some of these waves were put out, and the instructions contained —and our client—will show that certain precautions should be taken if a person has a scalp that has sores on it, the hair is broken, and so forth, and some of these solutions, the evidence will indicate, are prepared to be used upon people that have bleached their hair, tinted their hair and their hair will not take quite as strong a solution; others are for normal hair. We believe, and our evidence will show, that the content in this case was 6.94 thioglycolate acid, but the important factor, the evidence will show, is what they call the RH factor, certain ammonium is mixed with the thioglycolate acid and they change it, the evidence will indicate, from an acid to an alkali and, although it's referred to as an acid the solution is an alkali, it is not an acid, but an alkali; that the standard accepted is between 9.0 to 9.5. I believe the evidence in this case will indicate that the RH factor for the particular product in question was 9.05 within normal

limits. I further believe the evidence will indicate that this particular batch had been distributed, and thousands of bottles of it, to various parts of the country. There is no complaint or knowledge or notice that anybody complained to my client about this particular batch other than this one case. [58] I believe the evidence will indicate, by various witnesses, that it is quite frequent that they do have complaints of people having their hair break off at times from certain cold wave solutions. The evidence in this case will show that the doctors that we will call, and the beauty experts, that they have never heard of a case where anybody has permanently lost their hair by reason of the use of a cold wave solution, such as the one in question. We will show that the formula used was a basic formula and that due care was used by the defendant in the compounding, mixing and distributing of this particular product. Further, ladies and gentlemen of the jury, the evidence will indicate that the plaintiff—when I say "the evidence will indicate," you have to accept her statement, so forth, that she did receive a home permanent on February 5, 1955, according to her testimony, in Kensal, North Dakota. I believe the evidence will indicate in this case that there was a mix-up in the time that this wave was placed on her hair. I believe two depositions, of her mother and a Mrs. Jorgenson, state to you by way of depositions, that they started to rinse part of it out and they found out they should have left it on fifteen [59] minutes longer, so they permitted this solution to remain

on her hair a little longer, but I submit to you, ladies and gentlemen, I believe the evidence will clearly indicate that there was an error in the timing factor, in the giving of this wave to this young lady by her mother and this other lady. I believe further, ladies and gentlemen of the jury, that the evidence will indicate that this was given on February 5, 1955; that the plaintiff first saw a local doctor in her home town, who I believe the evidence will indicate was President of the Board of Directors of the School District, and he had examined her shortly prior to that time for a basketball tournament, or something which she was playing in; that he then saw her on February 28, 1955. The evidence will indicate at that time that he diagnosed her case as seborrheic dermatitis; that he found that she was suffering from this condition, which we will have expert witnesses—dermatologists—who will state to you what seborrheic dermatitis is; but I think the evidence will indicate that it is a condition not caused by the application of a cold solution, but from underlying physiological causes, systemic causes. I believe the evidence will indicate that she was prescribed selsum by Dr. Martin, her local physician, on February 28, 1955; [60] that thereafter she did not see any doctor, as far as we know—we have taken her deposition—until sometime in July 1955. She was again seen by Dr. Martin, he referred her to a dermatologist, Dr. Melton, in Fargo, North Dakota; that thereafter she did see a Dr. Michelson, a leading dermatologist, I believe he's located in Minneapolis, I'm not sure ex-

actly—the evidence will show that; that he examined her and his diagnosis was fragilitis crinium and seborrheic dermatitis and he also stated that another condition which must be considered was alopecia areata, which "alopecia" is baldness, "areata" is area, and so forth, but that the cause of it is from an underlying physiological cause or systemic cause; that he had found seborrheic dermatitis, which was a condition found by Dr. Martin on February 28th. Further, ladies and gentlemen of the jury, I believe the evidence will further show that she has been examined by a local doctor on our behalf, a Dr. Harvey Starr, a leading dermatologist in this locality; that he has found, through his examination, that she is suffering from the same condition diagnosed by this leading dermatologist in Minneapolis a couple of years ago, to be fragilitis crinium, and he will explain to you what that condition is. I feel that the evidence will further indicate that Dr. Starr will state that, in his opinion, she has a good [61] head of hair insofar as there is plenty of hair there; that it's a matter of receiving proper treatment and with proper treatment that the plaintiff, this young lady, can eventually have a good thick head of hair if she is properly treated. I believe the evidence will indicate that she now has a seborrheic dermatitis condition; that her scalp is dry; that she has not, as far as we know, and I believe the deposition will indicate, been receiving any proper treatment to restore her hair, but I submit to you that the evidence will clearly show in this case, ladies and gen-

tlemen, that the unfortunate condition from which plaintiff is suffering today was not caused by the cold wave solution which we have mentioned, there was no causal connection at all. I believe the evidence will clearly bear that out. Further, I believe the evidence will clearly bear out there has been no negligence on the part of Mr. Lewis in the compounding, mixing, selling or distributing of this product Cara Nome, or upon the defendant Rexall Drug; there has been no breach of any warranty on the part of the defendant, but the sole, only, proximate cause of the plaintiff's unfortunate condition is due to a systemic condition within her own body and that with the proper medical care and proper [62] treatment, that she can have a good head of hair, and in due time, ladies and gentlemen of the jury, we will ask for your verdict.

Mr. Bradish: I will reserve any statement I have.

The Court: Very well.

Mr. Lanier: May it please the Court, then at this time I would like to call Thomas Stark for cross examination under Federal Rules. [63]

THOMAS H. STARK

called as a witness on behalf of the plaintiff, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Cross Examination

The Clerk: What is your name?

The Witness: Thomas Stark.

(Testimony of Thomas H. Stark.)

The Clerk: (Spelling) S-t-a-r-k?

The Witness: Yes, sir.

The Clerk: Thank you.

Q. (By Mr. Lanier): Would you state your full name please? A. Thomas Henry Stark.

Q. And where do you live, Mr. Stark?

A. Van Nuys, California.

Q. That is near Los Angeles, I presume?

A. It is.

Q. And where do you work?

A. Rexall Drug Company.

Q. That's in their central office here in Los Angeles? [64] A. Yes, sir.

Q. Where is that office located?

A. 8480 Beverly Boulevard.

Q. In what capacity do you work with them?

A. I'm the assistant manager of the insurance and taxation.

Q. And, as such, what are your duties—briefly?

A. Well, every insurance, or claim, against the Rexall Drug Company goes over my desk, and we prepare all the corporate income taxes.

Q. On or about the 26th day of August, of 1957, certain interrogatories were served upon you by the plaintiff in this case, and certain answers were given by your company. Is that correct?

A. To the best of my knowledge.

Q. As a matter of fact, I believe you gave those answers, did you not?

A. No, sir. I don't believe I would have.

Mr. Lanier: Now, your Honor, I don't know

(Testimony of Thomas H. Stark.)

what the rule is here on approaching witnesses from the counsel box. Do I request permission, or do I just do it?

The Court: I suppose you just do it. [65]

Q. (Mr. Lanier, resuming): I show you a copy of those interrogatories sent to me from your company and ask you to look at the particular heading, and then look at any of the questions you want to, and see if it refreshes your memory any?

Mr. Packard: Are you talking about the questions, counsel?

Mr. Lanier: Yes.

The Court: Well that reflects questions and answers, does it not?

Mr. Lanier: It reflects them both, your Honor.

A. Yes, sir, I signed those interrogatories.

Q. All right. Then that does refresh your memory a little, Mr. Stark? A. Yes, sir.

Q. All right. Now, also last Thursday, I believe, I had a subpoena served upon you by the United States marshal to appear, be in Court, and to bring with you the advertising records. Is that correct? A. That's right. Last Friday.

Q. Last Friday. And did you bring them with you? A. Yes, sir.

Q. Would you produce them for me please?

A. They are on counsel's desk there.

Q. Now, all of these records which now are quite voluminous, would you just tell me, briefly, what they consist of. [66] It might save us some time?

(Testimony of Thomas H. Stark.)

A. Well, I briefly looked through them. I have nothing to do with advertising. They consist of the show—radio shows—put on for the years 1953 and '54, the Amos & Andy Radio Shows, and they consist of mats which are used in our nationwide advertising, namely on what we call our "one-cent" sale. We have two of those a year.

Q. Now, in other words, you do have actually with you, certain advertising mats that have been used on a national scale—correct? A. Yes.

Q. That I presume is through national periodicals? A. Yes, sir.

Q. Do you recall, off-hand, which periodicals?

A. From looking at the mats, no; but I know that we advertise nationally through the Farm Journal, Life Magazine and Saturday Evening Post, and one or two others.

Q. Look, I believe, being one of them, is it not?

A. It could be sir; I'm not a reader of Look myself.

Q. And there is also a couple of farm periodicals that you advertise in, are there not?

A. Yes, sir. [67]

Q. Yes. And that advertising has been on a substantial basis ever since 1953, which is all I requested for. Is that correct? A. Yes, sir.

Q. Did you examine the mats yourself?

A. No, sir.

Q. Did you notice whether or not, in your advertising, as to Cara Nome pin curl permanent?

A. No, sir.

(Testimony of Thomas H. Stark.)

Q. You do not know exactly what they say?

A. No, sir.

Q. All right. In that event, would you please produce for me from these particular piles that you have brought here at my request—would you produce the mats of the ads themselves which include Cara Nome pin curl permanent?

Mr. Packard: Just a moment. I object that this is immaterial, irrelevant and incompetent, unless he can show that the plaintiff read, or—this particular—I mean, this is a fishing expedition. If they are claiming that the plaintiff read something, then he could ask this witness as to whether they disseminated this, but it would be immaterial if they spread it all over the country and she used some of it but didn't read it. I mean—— [68]

Mr. Lanier: If the Court please, it's impossible to put two witnesses on the stand at one time. If the testimony doesn't connect up, I am sure of course that the Court will so make a ruling——

The Court: Do you expect to make that proof?

Mr. Lanier: I do, your Honor.

Mr. Bradish: May I be heard? I have no objection to this witness finding the advertising periodicals which are produced here, up to and including the date of the purchase of this product, but did the subpoena call for all of the advertising matter up to the present time, and I submit to the Court that anything subsequent to February 5, 1955, would not be material in connection with this particular case.

(Testimony of Thomas H. Stark.)

Mr. Lanier: It might well be, your Honor.

Mr. Bradish: And much of this information is subsequent to 1955, so if I might suggest that if counsel restricts it to prior to the date of purchase of this product, then I think we can save an awful lot of time. [69]

Mr. Lanier: I will be willing to restrict that to 1953 and 1954, your Honor.

The Court: Very well.

Q. (Mr. Lanier, resuming): Now, could you comply for me please, Mr. Stark?

Mr. Bradish: I attempted to look at these myself, your Honor, and I submit it's going to take a long time.

Mr. Lanier: Well, I have one more suggestion, your Honor, in order not to take the time of the jury, if you just hold one minute. If that is true and if they will submit the particular part which I am talking about to me at a recess, I think probably we can save the time of the jury and the court.

The Court: Are you willing to do that?

Mr. Packard: Anything to save time, I'm willing to do your Honor.

The Court: Do you want to withdraw this witness for a moment?

Mr. Lanier: No, sir, I want some more with him, your Honor; but that part of it can wait if I can have them at the first recess. [70]

The Court: All right.

Q. (Mr. Lanier, resuming): Mr. Stark, are you or not familiar with the Cara Nome natural curl

(Testimony of Thomas H. Stark.)

pincurl permanent box and container in which it comes? A. No, sir.

Q. You are not personally familiar with that?

A. No, sir.

Q. And you are not personally familiar with its contents? A. No, sir.

Q. Since the start of this lawsuit and because you do have jurisdiction within your Company to investigate and put together for preparation when that happened, have you, since the start of this lawsuit, checked this particular package?

Mr. Packard: "This particular package"?

The Witness: You mean check the contents, or——

Q. The package itself, so that you are familiar with your own product and its package, the Cara Nome pincurl permanent? [71]

A. I have familiarized myself with the carton only.

Q. You have not familiarized yourself with the contents? A. In what manner do you mean?

Q. Do you know what the contents are?

Mr. Bradish: May I interrupt just for a moment, your Honor. I don't like to do it, but counsel has directed a question to this witness referring to "this, as your own product," and I might refer counsel to the admitted facts in the pretrial order, and more specifically in paragraph 5 of those admitted facts, in which counsel joined, to the effect that the Rexall Drug Company was the national distributor; that the defendant Rexall did not par-

(Testimony of Thomas H. Stark.)

ticipate in the preparation or the manufacture of the product, but purchased and sold said product in sealed containers as received from defendant Arnold L. Lewis, doing business as Studio Cosmetics Company. So, I believe the question directed to this witness which referred to "this," as "your own product," which infers the product of the Rexall Drug Company, is incorrect, and——

The Court: I think the jury should disregard the reference there to "this product" as Rexall's own product. I assume that counsel means the product was handled by Rexall. [72]

Mr. Lanier: That is correct, your Honor.

Q. (Mr. Lanier, resuming): Mr. Stark, the Cara Nome package which sits here on the counsel table, have you familiarized yourself with that package since the institution of this lawsuit?

A. The carton or the contents?

Q. Both. First of all, take the carton?

A. I know what the product looks like, as far as the carton is concerned, since this incident, and as far as the contents are concerned, I only know from hearsay.

Q. You mean you, yourself, have not looked inside of a like container?

A. Yes, I've looked inside.

Q. And removed the contents? A. Yes.

Q. So that you know what's in it?

Mr. Packard: Now you're talking, after the accident?

Mr. Lanier: After the accident.

(Testimony of Thomas H. Stark.)

A. Well, I know that the carton states that it's a pincurl permanent, but of my own knowledge I wouldn't know. [73]

Q. I'm not going to ask you for any technical knowledge of the contents.

Would you mark this please?

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Thereupon, Plaintiff's Exhibit No. 1 was marked by the Clerk, for identification.)

Q. (Mr. Lanier, resuming): Now, Mr. Stark, I hand you plaintiff's Exhibit 1——

Mr. Packard: Counsel, are you going to show that to us before——

Mr. Lanier: I'm not offering it yet; I'll show it to you before I offer it.

Mr. Packard: Well you're showing the witness, you're referring to it——

Mr. Lanier: This is cross, your Honor, and any time before I offer this I will show it to counsel.

Mr. Packard: I think the——

The Court: I think the normal practice is that you offer it to other counsel, when they suggest a desire to see it. [74]

Mr. Bradish: May I just inquire, is this an exhibit, or is it marked for identification?

Mr. Lanier: It's not marked for identification.

Mr. Bradish: Well you directed your question, you said when you handed it to him, it's plaintiff's Exhibit No. 1. I wonder if——

(Testimony of Thomas H. Stark.)

The Clerk: This is an exhibit marked for identification as No. 1.

(Counsel for Defendants confer.)

Mr. Packard: Okay, you may proceed.

Q. (Mr. Lanier, resuming): I now show you Plaintiff's Exhibit 1, which has been marked for identification and I ask you, Mr. Stark, will you please open up Exhibit 1, examine its contents and tell me whether or not that is the proper content of the Cara Nome permanent wave kit that it purports to be?

Mr. Packard: I object. It calls for a conclusion of this witness—whether that's the proper content. He said that he has not seen it since the incident in question. Therefore, this witness is not properly qualified to testify [75] that this is the content——

The Court: I didn't so understand him to testify. I thought he said he had seen it.

Mr. Packard: No, I believe his testimony was that since this incident——

The Court: Oh, the incident being the use of it by the plaintiff. You've seen it since that time, haven't you. He hasn't seen it before that time, Mr. Packard.

Mr. Packard: That's the point I'm making, he hasn't seen it before that time, so it's immaterial if he is acquainted with the product at this time, because we're only interested in what the content of the box was prior to or before the plaintiff used it.

Mr. Lanier: This is an investigating officer on

(Testimony of Thomas H. Stark.)

claims, your Honor, and certainly can testify himself as to whether or not the simple contents of that bottle are the correct kit or not, and if not he is capable of saying he doesn't know.

Mr. Bradish: Just a minute. Gentlemen, and your Honor, may we have [76] some foundation as to when this bottle was put into this carton and whether or not it is in any way related to the bottle allegedly purchased and used by this plaintiff. This may be a bottle that has just started to be manufactured and put together. I don't have any idea where this particular bottle——

The Court: This man should know what he is being asked. If he doesn't, he can say so.

Mr. Packard: Well I object. There's no proper foundation laid, and it calls for a conclusion of the witness——

Mr. Lanier: It's their product, your Honor. I'm only trying to ascertain if I have the right product and if he can identify it.

The Court: He may answer.

The Witness: Is the question, "Can I identify it"?

Mr. Lanier: As the proper content of the Cara Nome kit?

Mr. Packard: May I ask a couple——

A. No. [77]

Q. (Mr. Lanier, resuming): All right. Will you tell me why not? A. Well——

Mr. Packard: I object to that, that's immaterial, irrelevant and incompetent.

(Testimony of Thomas H. Stark.)

The Court: You may answer.

A. The product is not manufactured by Rexall Drug Company.

Q. Do you distribute that product under your name? A. Under Rexall's name?

Q. Yes? A. Yes.

Q. Then, is that the kit that your company distributes? A. I couldn't answer that.

Mr. Bradish: This has all been taken care of, your Honor, by admissions in admitted facts in the pretrial order.

Mr. Lanier: All right. Do you admit that this is the kit?

Mr. Packard: No. I will not admit that that's the kit and—— [78]

The Court: Let's get along here.

Q. (Mr. Lanier, resuming): Is this bottle a standard part of this kit?

The Court: If you know.

Mr. Packard: I object. It calls for a conclusion of this witness.

The Court: Say if he knows. You object to everything.

Mr. Packard: Your Honor, I take exception to that remark——

The Court: We will never get through with the trial of this case——

Mr. Packard: All right. I would like the record to show——

The Court: Well the record can show what you please.

(Testimony of Thomas H. Stark.)

Mr. Packard: (Continuing) ——I would like to state my objections?

The Court: The Court has said "if you know," and then you jumped up and said it called for a conclusion. [79] If he doesn't know, he can say so.

Mr. Packard: If I may point out, your Honor, to the Court, this witness has testified he has never seen this package until after February 5, 1955, so therefore, it's immaterial, irrelevant and incompetent. Any questions as to what it contained before February 5, 1955, would be a conclusion on the part of this witness.

Mr. Lanier: We could save a lot of time, your Honor, if they would concede that this is the proper package they put out and represented by them——

Mr. Packard: May we approach the bench, your Honor, just one moment and I think we can clear the whole matter up?

The Court: Yes. Anything to clear it up.

(Whereupon, counsel and the reporter approached the Bench and out of the hearing of the jury the following proceedings were had:) [80]

Mr. Packard: The reason that I'm objecting, your Honor, is the fact that counsel has placed before this witness a kit containing a guarantee which my client has advised was never put into the kit. It's a guarantee that if you don't like the product, you get twice your money back, or something like that, but this slip was not in any of them he sent out, and I'll stipulate—I have a kit right on

(Testimony of Thomas H. Stark.)

my desk—I'll stipulate it's a kit that was used, but when we sent them out they did not have this guarantee. Counsel is trying, through this witness, to get this guarantee into evidence. That's the reason I'm objecting so strenuously. He hasn't laid a proper foundation. The guarantee is right there, he can take a look at it.

The Court: The witness has testified he doesn't know.

Mr. Lanier: I think from his last answer. I think that's as far as——

Mr. Packard: I wanted your Honor to know that I wasn't just objecting. That's why I wanted to see the box because he told me during the recess that he had a guarantee. [81] My client advises me he never put the guarantee in; that the distributor would give these out, "that if you don't like this product you get twice your money back" and that was the reason, and I apologize——

Mr. Lanier: They seem to forget there are two defendants, your Honor. I don't care if they put it in.

Mr. Bradish: On behalf of my client, if they are seeking to recover on the guarantee, I'll stipulate it's a guarantee——

Mr. Packard: (Continuing) Anyway, I wanted your Honor to be clear on what my purpose was.

The Court: Very well.

(Whereupon, the following proceedings were had in open court:)

The Court: Proceed Mr. Lanier. The answer

(Testimony of Thomas H. Stark.)

stands so far as I recall. The witness doesn't know the answer to your last question.

Mr. Lanier: Could I have the last question and answer please?

The Court: Are you talking about now or——

Mr. Lanier: I'm talking about all of them generally.

The Court: The objection that counsel makes is that you are trying to get the witness to identify it into evidence here, or lay a foundation for evidence of a kit which was issued some three years later than the time when the kit was used on which this case is based.

Mr. Lanier: That is correct, your Honor.

The Witness: Your Honor, could I answer the question?

The Court: No. You wait. You get a question before you answer.

Mr. Packard: I have a kit here counsel, I'll stipulate you may introduce into evidence——

Mr. Lanier: All right, counsel. Maybe we will shorten this. And also then, will you stipulate at the same time that besides the contents of that kit, that the Rexall Company also put a guarantee with that——

Mr. Packard: Well, now, counsel, I assign that as misconduct. [83] That is the very thing we are objecting to. I have stated that there was no guarantee——

Mr. Lanier: I am asking you when you offer it, can you stipulate it.

(Testimony of Thomas H. Stark.)

Mr. Packard: I submit, your Honor, that——

The Court: Let's start out and do it one thing at a time. Do you wish to stipulate, Mr. Lanier, that this is the type of package that has the contents——

Mr. Packard: This one right here——

The Court (Continuing): ——that was issued to your client at the time or before——

Mr. Lanier: I will so stipulate.

The Court: Then what about the contents? Do you mean to make that include the contents?

Mr. Lanier: I will also stipulate that the contents are correct—let me once check the directions. [84] That the directions are the same——

The Court: The same as what?

Mr. Lanier: As the box sold to us and used by us three years ago, reserving of course any rights that there might be as to different chemical content within this bottle, but that it does represent——

Mr. Packard: That's understood. Mr. Lewis himself purchased it this morning at Rexall.

Mr. Lanier: I so stipulate now with one exception, that is that within the contents of this box there is no guarantee within the contents of this box.

Mr. Packard: I'll stipulate there's no guarantee in there.

Mr. Lanier: All right. Now, will you stipulate further, counsel, that at the time in question, in February 1955, that there was a guarantee within that box?

(Testimony of Thomas H. Stark.)

Mr. Packard: I will not stipulate, because my client tells me he didn't put any guarantee in it, but if Rexall put a [85] guarantee in, maybe Mr. Bradish will stipulate.

Mr. Lanier: Will you so stipulate, Mr. Bradish?

Mr. Bradish: No. I can't stipulate under the admissions in the pretrial order that we bought it in a sealed container and dispensed it in a sealed container.

Mr. Lanier: At this time, then, may it please the Court, I wish to withdraw Exhibit 1, and substitute therefor the bottle which, and the kit, which has been stipulated to between counsel, and have it marked as Exhibit 1, for the plaintiff instead?

The Court: Do you want that marked as an exhibit or merely for identification?

Mr. Lanier: I would now like to have it marked as an exhibit for identification, as Exhibit 1.

Mr. Packard: I'll stipulate that it may go into evidence as an exhibit at this time, if you so wish.

Mr. Lanier: I will so stipulate. [86]

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 1 admitted into evidence.

(Whereupon, the original Plaintiff's Exhibit No. 1, marked for identification, is withdrawn, and in lieu thereof, the bottle and kit stipulated to between counsel, is marked Plaintiff's Exhibit No. 1, received in evidence and made a part of this record.)

Q. (Mr. Lanier, resuming): During the course

(Testimony of Thomas H. Stark.)

of your investigation of this case, Mr. Stark, did you have any occasion to investigate the warranties and the guarantees that when with your merchandise?

Mr. Bradish: Just a moment. I have to object to that question as calling for his conclusion, and a conclusion of law, namely, warranties and guarantees in connection with his merchandise and, again, I must remind the Court of the pretrial admissions that this defendant was a distributor only of the product bought in this little container; they were not manufactured by this defendant. Whether or not it is a warranty is a question for this jury to determine and not a conclusion of this witness. [87]

The Court: Well, do you take the position that even though it might be true that the Rexall Company didn't put the guarantee in that it can't be proved now on account of the pretrial stipulation?

Mr. Bradish: No, if it can be proved that the Rexall Company put a guarantee in there, I'd like to see it. I don't contend——

The Court: Is it your contention that there was no such guarantee put in there—is that your present contention?

Mr. Bradish: Not by the Rexall Company, and, secondly, it's my contention, and my objection is directed to this specific question on the grounds it calls for his conclusion as to what constitute a warranty or a guarantee.

The Court: The question was, did he make an

(Testimony of Thomas H. Stark.)

investigation. He didn't ask for any answer to it.

Mr. Bradish: May I respectfully request a rereading of the question?

The Court: Yes. The reporter may read the question. [88]

(The reporter read the pending question: "During the course of your investigation of this case, Mr. Stark, did you have any occasion to investigate the warranties and the guarantees that went with this merchandise?")

Mr. Lanier: All I have asked, Your Honor, is a yes or no answer.

The Court: Did you investigate that?

The Witness: No, sir.

Mr. Lanier: That does it, Your Honor.

Q. (Mr. Lanier, resuming): Now, Mr. Stark, when was the first time that it came to your attention that a claim was being made against the Rexall Company in the Sandra Nihill case?

A. I couldn't answer that question without my file.

Q. Would you take your file and answer it?

A. My file is in the office.

Q. You did not bring it with you?

A. No, sir, you did not ask for it.

Q. Is it true or not that you received your first notice on [89] July 5, 1955?

A. I believe I answered that question by my last answer, didn't I?

Mr. Lanier: Mark this Plaintiff's Exhibit 2 for identification, please.

(Testimony of Thomas H. Stark.)

The Clerk: Plaintiff's Exhibit No. 2 is marked for identification.

(Whereupon, Plaintiff's Exhibit No. 2, copy of a letter, was marked for identification.)

Q. (Mr. Lanier, resuming): Will you look at Plaintiff's Exhibit 2 and tell me whether or not you have the original of that in your files and whether you personally saw it?

A. I believe we will have a copy of this in our file.

Q. You recall it, do you?

The Court: It would be the original, would it not, Mr. Lanier?

The Witness: Yes, sir.

Q. That's the original of course that you have, is it not? A. I believe so.

Q. And you recall this letter. [90]

A. Yes, sir.

Q. Thank you. Now, then, will you tell me whether or not, shortly after receiving that letter, your company retained the firm of Chase, Fredericks and Fredericks, Attorneys at law at Jamestown, North Dakota, to investigate this claim?

Mr. Packard: You can answer that yes or no.

A. I couldn't answer it either way at this time.

Q. And your records also would disclose of course whether that is true or not?

A. Yes, the records would.

Q. Then, over the evening and after the recess, will you check your records for that and bring your correspondence between you and that law firm of

(Testimony of Thomas H. Stark.)

Chase, Fredericks and Fredericks, of Jamestown, to court with you?

A. When you say "you", are you referring to Rexall or myself?

Q. I'm referring to yourself because the subpoena was served upon you. You answered to interrogatories in the first place and you have testified that you had charge of the investigation of this claim when it came in. I presume that you have the general custody of such records, do you not? [91]

A. I have charge of the records, Mr. Lanier, but I am not in charge of the investigations.

Q. Can you produce those letters that I speak of? A. If they are in our files, yes.

Q. All right. Are you acquainted with Miss A. Roney of your Company? A. Yes, sir.

Mr. Lanier: Mark that exhibit for identification.

The Clerk: Plaintiff's Exhibit No. 3 is marked for identification.

(Whereupon, Plaintiff's Exhibit No. 3, a letter, was marked for identification.)

Q. (Mr. Lanier, resuming): Will you tell me what position with the Rexall Drug Company that Miss A. Roney holds?

A. She is no longer employed by Rexall, but at the time you are referring to she worked as an assistant to a Mr. Bricken.

Q. What is his capacity?

A. He is assistant secretary of Rexall Drugs.

Q. I show you plaintiff's Exhibit No. 3 and ask you, during the course of your investigation,

(Testimony of Thomas H. Stark.)

whether or not you were aware that that letter was written? [92] A. Yes.

Q. All right. You recall that letter, and do you know of your own knowledge that, pursuant to the expression in Exhibit 3, whether or not the Studio Cosmetics Company was so notified?

A. I couldn't answer that without the file Mr. Lanier.

Q. Well, in checking your records, the same as——

Mr. Packard: I'll stipulate maybe counsel, whatever the facts are.

Mr. Lanier: All right. It may be stipulated that on or about August 16, 1955, the Studio Cosmetics Company was advised by the Rexall Company that a claim for damages had been made against them.

Mr. Packard: I also stipulate that Mr. Lewis received a letter under date of August 16, 1955, from Rexall Drug advising him of this claim, on August 16, 1955.

Q. (Mr. Lanier, resuming): You personally, Mr. Stark, are not in the advertising department itself? A. No, sir.

Q. You are not familiar with the advertising program and so forth. A. No, sir. [93]

Mr. Lanier: That's all I have, Your Honor.

Mr. Bradish: Nothing at this time.

Mr. Packard: I haven't any questions at this time.

The Court: You may stand aside.

(Witness is excused.)

Mr. Lanier: May it please the Court, at this time plaintiff would like to call to the stand for cross-examination under Federal Rules, Arnold L. Lewis.

Whereupon,

ARNOLD L. LEWIS

called as a witness on behalf of the plaintiff, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Cross Examination

Q. (By Mr. Lanier): Would you state your full name please? A. Arnold L. Lewis.

Q. And what is your business, Mr. Lewis? [94]

A. Cosmetic manufacturer.

Q. Where do you live?

A. West Los Angeles.

Q. And where is your corporation?

A. This is not a corporation.

Q. Your Company then?

A. The Company is on West Olympic Boulevard.

Q. Here in Los Angeles? A. That's right.

Q. And in what capacity are you with that Company? A. I'm the sole owner.

Q. You are the sole owner. Then, I presume, also the general manager. Is that correct?

A. Correct.

Q. And you have been in that business for how long, Mr. Lewis?

A. Since about 1936.

(Testimony of Arnold L. Lewis.)

Q. And that has been manufacturing cosmetics of various types? A. Yes, sir.

Q. And I presume, as such a cosmetic manufacturer, Mr. Lewis, that you manufacture and then contract with various companies, a distributing agency, to distribute under their brand, or trade name. Is that correct? [95]

A. That is one phase of my business.

Q. And so far as Cara Nome is concerned, you manufacture the product?

A. That particular product.

Q. The name is used by Rexall Company?

A. They own that name.

Q. Yes. And you make it and prepare it for them and so forth? A. Correct.

Q. You also, I presume, had a purchase agreement between you and Rexall Company. Is that correct? A. Yes, in a way.

Q. So that it requires a specific purchase order from Rexall before you make up a batch of cosmetics and deliver on contract for them?

A. Correct.

Q. Do you have with you, by any chance, a sample or an example of that type of purchase order? A. No, sir.

Mr. Lanier: Mark this for identification.

The Clerk: Plaintiff's Exhibit No. 4 marked for identification. [96]

(Whereupon, Plaintiff's Exhibit No. 4, purchase order, was marked for identification.)

(Testimony of Arnold L. Lewis.)

(Counsel for defendants examine said exhibit.)

Mr. Parkard: This is quite long and I would like to read the terms of it, Your Honor.

(Off the record conference between counsel.)

Mr. Packard: May we approach the bench, Your Honor.

The Court: Very well.

(Whereupon, counsel and the reporter approached the Bench, and the following proceedings were had, out of the hearing of the jury:)

Mr. Packard: I have had called to my attention certain contractual provisions in this purchase order and I submit this purchase order is not for the benefit of third parties. That this is an agreement between Mr. Lewis, assuming he entered into this, I don't know, but assuming he did work under this purchase order, certainly we are going to be trying collateral issues as to whether this is for the benefit of any third parties, or the plaintiff. [97]

Mr. Lanier: Counsel, I think you probably have a good point. I will withdraw this.

(Whereupon, the following proceedings were had in open court:)

Mr. Lanier: Mark this please.

The Clerk: Can I give this No. 4?

Mr. Lanier: Well, no, you have a record on the other. I'm perfectly willing to withdraw it, you might as well number it 5, so you don't get confused.

(Testimony of Arnold L. Lewis.)

Mr. Packard: You can leave it in for identification. It's been marked.

The Court: What was it marked—Exhibit 5?

The Clerk: 4. This will be 5. Plaintiff's Exhibit 5 marked for identification.

(Whereupon, Plaintiff's Exhibit No. 5, a Cara Nome Bottle, was marked for identification.) [98]

Q. (Mr. Lanier, resuming): Showing you plaintiff's Exhibit 5, will you tell me whether or not that is a bottle containing the solution—the lotion—within a Cara Nome pincurl permanent box?

A. We use bottles similar to those.

Q. It looks like one of yours, is that correct?

A. Yes.

Q. Will you look at it very carefully and tell me whether or not it does not carry the lot number 181?

A. I'm awfully sorry but if it does, I can't see it.

Q. In other words, you can't read it. All right. But that does look like one of your bottles and is at least certainly one of your labels—correct?

A. Correct, sir.

Q. Now, do you recall, Mr. Lewis, on or about the 26th day of August, 1957, having served upon you certain interrogatories and you giving thereto certain answers?

A. I recall—when was that 1957?

Q. August 27, 1957?

A. Yes, I recall them.

(Testimony of Arnold L. Lewis.)

Q. Do you recall at that time the following question asked you and the following answer given?

"In what proportions are such ingredients"—that's page 3, counsel if you want to follow it—"in what [99] proportions are such ingredients placed in a bottle of the size alleged to have been sold to plaintiff herein?"

And your answer being—

"Ammonium thioglycolate—5%; aqua ammonia C.P.—.75%; distilled water 94.25%."

A. Could I see the——

Q. You may. (Counsel handed the document from which he was reading to the witness.)

A. Well, this is correct in part. I can——

Q. One moment—first of all, I want to know if you answered that interrogatory?

A. I did answer it.

Q. And is that the answer that you gave me?

Mr. Packard: I'll stipulate, counsel, that those are the answers——

Mr. Lanier: Well I prefer to go——

Mr. Packard: I'll stipulate that all the answers contained in there are the answers that he has set forth at that time.

Mr. Lanier: And you agree then, Mr. Witness——

The Witness: That's correct.

Mr. Lanier: All right. And at that time you answered and said that the content was 5% ammonium thioglycolate? A. Yes, sir.

Q. Now, also, did you or not tell me that it was made under the supervision of a chemist?

(Testimony of Arnold L. Lewis.)

A. Correct.

Q. And what is the name of that chemist?

A. That chemist is no longer employed by us. When are you referring to, what period, 1957?

Q. Batch 181.

A. Oh, Batch 181. That was in 1955. The chemist's name was Louis Monteau. (?)

Q. And where is he now?

A. I don't know.

Q. Why did he leave your company?

Mr. Packard: That's immaterial.

Mr. Lanier: It becomes material under your negligence allegations, Your Honor.

Mr. Packard: There's no materiality—— [101]

The Court: Sustained.

Q. (Mr. Lanier, resuming): Were the services of the chemist who had charge of preparing batch 181 satisfactory? A. Yes, sir.

Q. Was he discharged for any misconduct on duty? A. No, sir.

Mr. Bradish: Just a moment. I object to that. It's assuming facts not in evidence. If he was discharged——

The Court: The whole question is, was he discharged, and if he was, was it for misconduct.

A. I could say that he was not discharged.

Q. Was he a competent chemist?

A. Yes, he was.

Q. You have no idea who he is working for now?

A. Well, I haven't any idea; I think I can find out.

(Testimony of Arnold L. Lewis.)

Q. Well, in the interrogatories of last August 27th, you were asked to find out, were you not? Were you asked where he was?

A. I don't remember. [102]

Q. Your answer was "no", that you didn't know.

A. Perhaps I didn't know at the time.

Q. If you can find out, will you get me his address and have it in court tomorrow morning?

A. I can't guarantee that.

Q. If you can.

Mr. Packard: We don't have to, at this time, investigate the case for him.

The Court: Well, if he can get the information and give it to counsel, counsel will get him into court I expect.

Mr. Lanier: In spite of counsel, if you can find it, will you bring it back tomorrow morning?

A. You mean the——

Q. Mr. Monteau. A. Bring him back?

Q. No, his address.

A. Oh, I beg your pardon. I certainly shall do so.

Q. Now, then, we are agreed that the solution used was from batch 181, are we not?

A. Well, I don't know who agreed to that, but assuming that that is the number that appears on that bottle [103] and if that's the bottle that's used, then that is from that batch.

Q. All right. And you have had checked what samples you could from wherever they could be found, of 181, is that correct?

(Testimony of Arnold L. Lewis.)

A. Yes, sir, I think that's correct.

Q. And will you tell me what the actual ammonium thioglycolate content was in the check that you made?

Mr. Packard: Well I object, it's incompetent, irrelevant and immaterial, and it's privileged.

Mr. Lanier: He has made a check of his own product, there is a lawsuit now being tried, counsel has made a statement to the jury of what the content of ammonium thioglycolate is, and now it's privileged.

The Court: I think he should be permitted to answer, Mr. Packard.

Mr. Packard: I have a report—this witness I think he said it had been made—I had it made——

The Witness: I was just going to——

Mr. Packard: I mean the witness has never——

Q. (By Mr. Lanier): Do you know what the percentage of thioglycolate was in that particular report?

Mr. Packard: I object. The best evidence is the report itself.

Mr. Lanier: This is cross-examination, Your Honor.

The Court: If he knows, he may tell him.

The Witness: I know it because I saw the report.

Q. All right, will you tell me what the percentage was?

A. I can't tell you exactly. I think it was six-nine-four, or seven——

(Testimony of Arnold L. Lewis.)

Q. It was approximately seven percent, was it not? A. Approximately.

Q. All right. Seven percent being about forty percent higher than the five percent which you instructed your chemist to put in?

Mr. Packard: Just a moment, I object to the form of the question. It's assuming facts not in evidence, "that he instructed the chemist to put in".

The Court: Well, I suppose the witness has no business of calculating [105] for you, Mr. Lanier.

Mr. Packard: Assuming facts not in evidence, that he instructed his chemist to put any particular percent in.

The Court: Yes, that was in the statement. Of course, the jury will disregard it.

Mr. Lanier: Will you mark this for identification please.

Mr. Packard: What's this?

Mr. Lanier: Counsel, in due time you will see what it is.

The Clerk: Plaintiff's Exhibit No. 6 is marked for identification.

(Whereupon, Plaintiff's Exhibit No. 6 was marked for identification.)

Mr. Lanier: Now, counsel, I show you plaintiff's Exhibit 6, which are the interrogatories previously asked of this witness, and answered. At this time, may it please the Court, I offer in evidence Plaintiff's Exhibit 6, Interrogatories asked and answers given by this witness. [106]

Mr. Bradish: If the Court please, on behalf of

(Testimony of Arnold L. Lewis.)

the Owl Drug Company and Rexall, I would like to object to these as not being binding on that defendant, they being the interrogatories of another defendant—co-defendant in the case, and for which there has been no——

The Court: That would be true as to this exhibit, wouldn't it?

Mr. Lanier: It would not, Your Honor. Now because of that, in order to answer some more of this again, would you please mark this exhibit taken by this particular defendant——

Mr. Bradish: May we have first the Court's ruling on my objection?

The Court: Objection sustained at the moment as to the Rexall people.

Mr. Packard: And I would like to object, Your Honor, upon the basis, I have no objection to the particular question that's been asked the witness, but there's six pages and a lot are objectionable. We go ahead and answer these interrogatories, but I feel we are not [107] bound, there's a lot of information in there that isn't admissible. It's my understanding, they are to give him information, he may confront the witness, and we have a right to object on each and every one of the questions that are asked, if there's any proper objection to them, but to just throw all the interrogatories into evidence——

The Court: Well, perhaps you better confine it to the one that you think is——

Mr. Lanier: If the Court prefers that I pursue

(Testimony of Arnold L. Lewis.)

the question and answer, I will Your Honor.

The Witness: Could I confer with my attorney to clear up a point?

The Court: Mr. Lanier, the witness would like to speak to his attorney for just a moment.

Mr. Lanier: Well I guess I can understand that, Your Honor. I have no objection.

The Court: You may step over and speak to him. He has a matter he wants to clear up in his mind, he has a right to do that. [108]

Mr. Packard: Come over here.

(The witness confers with counsel and returns to the witness chair.)

Q. (Mr. Lanier, resuming): Mr. Lewis, in the interrogatories asked you, at the bottom of page 2, counsel, on August 27th, to which you answered, were or not the following questions asked and the following answers given?:

Question—"What are the ingredients, chemical or otherwise, in Cara Nome?"

And did you not give the following answer:

Answer—"The ingredients used in the Cara Nome permanent wave are common chemicals used in virtually all permanent wave preparations on the market, namely, ammonium thioglycolate, distilled water and aqua ammonia C.P."

Did you or not give that answer?

A. Yes, sir.

Q. Did you not give the following answer and question:

"In what proportions are such ingredients placed

(Testimony of Arnold L. Lewis.)

in a bottle of the size alleged to have been sold to plaintiff herein?"

And for answer, did you not state: [109]

"Ammonium thioglycolate—5%;"

A. I said that because at that time——

Q. Now, just answer yes or no.

Mr. Packard: We stipulate——

The Court: Let him answer the question.

A. I said that at that time because I was under the impression——

Q. Yes or no, Mr. Witness?

A. I'm sorry, I'd like to qualify that yes or no.

The Court: You can qualify it later, but at this time you've no question like that before you.

A. Yes, I said that.

Q. Now your tests that you made of batch 181, will you tell me, first of all, where the bottles came from that you secured to make the tests?

A. From our laboratory.

Q. In other words, bottles still there which had not been shipped out?

A. These particular bottles were from samples which were retained from each batch.

Q. Samples? [110] A. Correct.

Q. Will you tell me and the jury how you go about sampling?

A. When a batch is completed, the first few bottles are taken off the line and set aside with a mark on them as to that particular batch—the code number is on there, so there's no need to mark it other than to set it aside.

(Testimony of Arnold L. Lewis.)

Q. And that is the way that you get your samples? A. Correct, sir.

Q. And the rest of them are sold or put out under contract? A. Yes.

Q. And those samples, and those samples only, are the ones that you keep for your samples?

A. Correct.

Q. So they come out of the batch first?

A. Well, not necessarily. Sometimes we take them out of the middle of the run; there's no set procedure on that.

Q. Ever take them off the bottom?

A. Occasionally.

Q. Primarily you are interested in sampling it first, are you not? [111]

A. Only for the purpose of keeping a bottle or two on hand for subsequent checks.

Q. Then, your first statement to me that the first thing you do is to take off two or three bottles of sample is incorrect?

A. I said occasionally we do that.

Q. Occasionally?

A. I'm not there——

Mr. Packard: I object. This is argumentative, Your Honor.

Mr. Lanier: It's very material, Your Honor.

The Court: I think he is trying to get at what the real procedure is.

A. There's no set procedure on that.

Q. You're apt to take that sample bottle anywhere then—— A. That's correct.

(Testimony of Arnold L. Lewis.)

Q. All right. Any particular reason in taking it from the bottom of the batch? The last of the batch?

A. It wouldn't make any difference; there's no special reason.

Q. Then there isn't any reason for doing it that way? A. No, sir. [112]

Q. All right. When you call a batch, like 181, how is that batch made up, what is it contained in, what is it mixed in?

A. It's mixed in a vat, capacity of three hundred gallons.

Q. That's one vat, three hundred gallon capacity? A. Correct.

Q. And that constitutes one batch?

A. Yes.

Q. Even if your order was large enough to require two or three of them, that would be another batch number? A. Correct.

Q. Whatever is in that one vat constitutes a batch number? A. (None).

Q. You seal all of your bottles before being delivered? A. Seal them?

Q. Yes?

A. They are sealed with a film-o-seal cap or were about that time. I don't recall when we changed our capping procedure, but we did use a film-o-seal cap, which is a piece of paper that is inserted inside the cap. The cap comes to us in that way, and we apply a mucilage to the top of the bottle and when the cap is put on the bottle it forms a seal. [113]

(Testimony of Arnold L. Lewis.)

Q. Theoretically then, they are sealed air-tight?

A. Correct.

Q. Why did you change?

Mr. Packard: I object. That's immaterial, irrelevant and incompetent.

A. We found it wasn't necessary——

The Court: Overruled. I think he—are you answering that?

Q. It wasn't necessary what?

A. It wasn't essential, I don't mean necessary. It wasn't essential.

Q. What is the difference, what do you do now?

A. We use a newer method which we believe gives a better seal, and is a polyethylene liner, called a poly-seal liner.

Q. And you feel it gives a better, more airtight seal than the one you were using at this time?

A. Yes, sir.

Q. So I take it you had some difficulty with the seal at the time—— A. No, sir.

Q. ——of this one? [114]

Mr. Packard: I object——

The Court: He said he did not have, so——

Q. But this definitely is a better seal?

A. It's a better manufacturing procedure.

Q. And making it more ascertained of being airtight?

A. I can't answer that other than it is a better manufacturing procedure in keeping with modernizing our operation.

(Testimony of Arnold L. Lewis.)

Q. Now, so far as you are concerned, Mr. Lewis, do you package the entire kit?

A. Yes, our Company packages the entire kit.

Q. And that, of course, is done under contract?

A. Yes.

Q. Do you personally, yourself, as Studio Cosmetics, do you put any guarantees, written, within the package? A. No, sir.

Q. You have nothing to do with that?

A. No, sir.

Q. Anything that Rexall may do with that package, you don't know anything about?

A. I know nothing about what they do with it after it's [115] shipped out of our place.

Q. Well now suppose that Rexall comes back and tells you they have had two or three bottles returned. Do you make that good to them or not?

A. Never have.

Q. Then you know nothing about any guarantee that they might have with a jobber or a retailer?

A. Nothing other than just what I've just stated.

Mr. Lanier: Mark this for identification.

The Clerk: Plaintiff's Exhibit No. 7 marked for identification.

(Whereupon, Plaintiff's Exhibit No. 7 was marked for identification.)

The Court: How much longer will this witness take, Mr. Lanier?

Mr. Lanier: I'm just about through, Your Honor.

Q. (Mr. Lanier, resuming): Mr. Lewis, I show you plaintiff's Exhibit No. 7 and ask you whether

(Testimony of Arnold L. Lewis.)

or not you are familiar with that document at all, or its type?

A. I am not familiar with it excepting that I think I saw this at the Rexall Drug Company at one time. [116]

Q. In other words, when you had been over at the Rexall Company you have seen those there?

A. I may have, I don't know. If I go to their drugstore I might see that.

Q. You have nothing to do with its preparation?

A. No, sir.

Q. And you have nothing to do with inserting that with your Cara Nome products?

A. No, sir.

Q. During the course of this testing, on this batch 181, do you know how many bottles were tested—was it from one or more?

A. Which testing are you referring to?

Q. The testing of the breakdown for the percentage of the ammonium thioglycolate?

A. There's no testing that does on. We don't start to bottle it until we know what the percentage is.

Q. Excuse me, Mr. Lewis, maybe I haven't made myself clear. Since the institution of this lawsuit, you have had certain samples of batch 181 broken down chemically for content?

A. I haven't had that done.

Q. Are you aware though of how it was done?

A. I have an idea how it was done. [117]

(Testimony of Arnold L. Lewis.)

Q. Do you know how many samples were made, from how many bottles?

A. I think only one.

Q. Only one. All right. That's all, Your Honor.

Mr. Packard: I don't have any questions at this time.

The Court: You may stand aside.

Members of the Jury, you will be permitted to separate for the evening and night and be back at ten o'clock in the morning in the jury room and you will be re-called as soon as the court is ready for you. I hope we get started very promptly in the morning. We've been delayed so much today, but don't talk to anybody about the case or permit anybody to talk to you about the case or permit anything to happen that might influence your thinking about the case. Keep your minds open and free and clear of all influences and suggestions except as you receive them here in this court-room from the witness-stand and from counsel and the court. You may go and be back at ten o'clock in the morning.

(Whereupon, at 4:35 o'clock p.m., April 8, 1958, the hearing was adjourned until ten o'clock a.m., April 9, 1958.) [118]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge Presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State

of California, on April 9, 1958, beginning at the hour of 10:10 a.m.

There were present, at said time and place, the appearances as heretofore noted.

Thereupon, the following proceedings were had in open Court:

The Court: All right, gentlemen?

Mr. Packard: Let me state, Your Honor, before we proceed, yesterday [119] Mr. Lanier offered these interrogatories, and I have read them and I have no objection to the interrogatories being offered in evidence, which he offered yesterday.

Mr. Lanier: No, I am satisfied now, Your Honor, the way we have proceeded.

The Court: Well, if you change your mind then you know what the position of the defendant is.

Mr. Packard: Yes, at any time you wish to offer them, I have no objection.

The Court: You may call your next witness if you are ready.

Mr. Lanier: May it please the Court, at this time I would like to call Mr. Stark back to the stand.

Thereupon,

THOMAS H. STARK

recalled on behalf of the plaintiff for further cross examination by Mr. Lanier, having been previously sworn, testified as follow, to-wit: [120]

Cross Examination

Q. (By Mr. Lanier): Yesterday, Mr. Stark, I requested that you take your advertising material which you had brought under subpoena and find me

(Testimony of Thomas H. Stark.)

those ads and maps for the years 1953 and 1954. Were you able to do that? A. Yes, sir.

Q. Do you have them with you?

A. Yes, sir.

Q. May I see them, please?

Mr. Bradish: Are these the ones?

The Witness: Yes.

(Witness hands documents to counsel.)

Mr. Lanier: Could I have a moment, Your Honor, to look at these?

The Court: All right.

Mr. Lanier: Will you mark each one of these please, for identification, plaintiff's Exhibits.

Mr. Packard: Are they being marked as one?

Mr. Lanier: They will probably have to be marked individually——

The Clerk: That would probably be better.

Mr. Lanier: ——there are so many different sizes and what-not. It would be pretty hard to put them together.

(Thereupon, Plaintiff's Exhibits Nos. 8 through 25, were marked for identification by the Clerk.)

The Clerk: Plaintiff's Exhibit 8 through 25 marked for identification.

Q. (Mr. Lanier, resuming): Now, Mr. Stark, to save time, in going through these, you are just vaguely familiar with them, are you not, and their contents? A. Yes.

Q. These Exhibits 8 through 25 inclusive are ad proofs, are they not, of ads which were run in

(Testimony of Thomas H. Stark.)

the years 1953, 1954, in various National periodicals?

A. To the best of my knowledge, yes.

Q. As you testified to yesterday? Now in addition thereto, Mr. Stark, Rexall also advertises Cara Nome products over t.v. and radio, do they not?

Mr. Packard: I think it should be limited to before or prior to February 5, 1955. We are not concerned with what they are doing today. I think the only relevant thing is what they were doing back in February 5, 1955.

The Court: I think that would be true, Mr. Lanier.

Q. (Mr. Lanier, resuming): All right. In 1953 and '54 Rexall also advertised Cara Nome Products via the medium of tv and radio?

A. It's very possible, but not to my own knowledge Mr. Lanier.

Q. All right. Now I also requested of you, Mr. Stark, that you bring with you the original of the letter of July 5, 1955, written to you. Did you bring that with you?

A. I don't have the original, Mr. Lanier; I have a photostat of the original.

Q. Do you have that with you?

A. Yes.

Q. May I have that, please?

A. It would be right on the bottom, Mr. Lanier.

(Counsel is making search through papers for document in question.) [123]

Mr. Lanier: Now, may I have this marked for identification.

(Testimony of Thomas H. Stark.)

(Thereupon, Plaintiff's Exhibit No. 26 was marked for identification, by the Clerk.)

The Clerk: Plaintiff's Exhibit No. 26 marked for identification.

Q. (Mr. Lanier, resuming): Now once more, Mr. Stark, I show you Plaintiff's Exhibit 2, which was shown to you yesterday and which you recognized. Now the photostat which I have is dated August 8th, from Mr. Roney; that letter is dated July 5, from Mr. Roney. Do you have the original of Exhibit 2?

A. Could you bring me my file?

Q. Sure. (Counsel hands file to witness.)

The Court: Do I understand that the exhibit you presented to the witness is Exhibit 2?

Mr. Lanier: Exhibit 2, yes, sir.

A. I have the copy of the letter, Mr. Lanier, not the original. This is a complaint which was written up and it quotes this letter exactly.

Q. Now, the exhibit that you are holding in your hand is not dated, is that correct or not?

A. The Exhibit I am holding in my hand is dated August [124] 22, 1955.

Q. May I see that a moment please? I want to have this marked for identification please.

(Thereupon, a document entitled "Complaint No. A-3584" was marked by the Clerk, Plaintiff's Exhibit No. 27, for identification.)

The Clerk: Plaintiff's Exhibit No. 27 marked for identification.

Mr. Packard: 26 is a letter under date of what?

(Testimony of Thomas H. Stark.)

The Court: What is the exhibit number?

Mr. Lanier: 27, Your Honor.

Q. (Mr. Lanier, resuming): Now, Mr. Stark, handing you back Exhibit 27, that refers to Plaintiff's Exhibit 2, does it not?

Mr. Bradish: Wait a minute, wait, wait——

Mr. Packard: I haven't seen that letter, the first letter——

Mr. Lanier: I am not talking about the contents of this, counsel.

Mr. Bradish: Well, if you say that refers to one exhibit and you are not talking about the contents, may I have some [125] expression from counsel as to what he is talking about? I think that if he is referring to the contents, I'll have to object. He is asking this witness to interpret demonstrative evidence, which——

Mr. Lanier: I am not referring to the contents, Your Honor. I am only laying a foundation to introduce a copy, Exhibit 2, into evidence, which is dated.

The Court: Apparently there is no question pending about the contents.

(Counsel confer.)

Q. (Mr. Lanier, resuming): In looking at Exhibit 27 again, Mr. Stark, and in looking at Exhibit 2, without discussing its contents at all, are they identical? A. No.

Q. Is the letter set forth in Exhibit 2, set forth in its entirety in Exhibit 27? A. Yes.

Q. Now, do you have the original Exhibit 2?

A. No.

(Testimony of Thomas H. Stark.)

Q. All right. At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit 2——

Mr. Bradish: Just a minute. To this I am objecting, because the [126-127] letter that's set forth in Exhibit No. 27, is not dated, Your Honor. It's a part of a report which bears the date of August, I believe it's the 22nd, and it refers to the contents of a letter which was received but the date is not shown. Now the photostatic copy of the letter which counsel asked Mr. Stark to bring bears date of August 8th, and if counsel will check with that letter he will find that the contents of the letter bearing date of August 8th is identical to the contents contained in part in the report, Exhibit 27. I object to the introduction of this document on the ground that it is a copy, not the original, and that no foundation has been offered for the admission of secondary evidence.

Mr. Lanier: May it please the Court, I am sure I don't know exactly what this bickering is about. This witness has testified that he is aware of the contents of that letter. He has testified that he has received that letter. He has testified that he does not have the original in his files. Therefore, the secondary copy becomes admissible.

Mr. Bradish: If the Court please, he has testified [128] that he received a letter of the contents which is contained in Exhibit 27, and he has a photostatic copy of that letter in his files which counsel requested yesterday, and which bears the date of August 8, 1955, and I'll ask the Court to

(Testimony of Thomas H. Stark.)

please compare the contents of the letter of August 8, 1955, which was introduced as an exhibit here, with the wording which is contained in this letter, and this copy purports to be dated July 5th. The dates here, of course, Your Honor, are exceedingly important and that's the reason for the objection.

Mr. Lanier: May it please the Court, the letter of August 8th, we also have, and we will eventually get to it after we dispose of the letter of July 5th. The letter of August 8th is an entirely separate letter. We have a copy of the letter of August 8th also.

The Court: Well perhaps you better—I'll withhold ruling here until you get around to the 8th, so I can straighten the whole matter out in my mind.

Q. (Mr. Lanier, resuming): Now, Mr. Stark, referring you to Plaintiff's Exhibit 26. Is that a photostatic copy of a letter received by you in re Sandra [129] Nihill, from Mr. T. A. Roney, of Carrington, North Dakota? A. Yes, sir.

Q. And this was a photostat from your files—correct? A. Yes.

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit 26.

Mr. Bradish: Just one moment. I have no objection to its coming in, but I would like counsel to show me what he has heretofore alleged that he has. His office copy of the letter which is photostated——

Mr. Lanier: Counsel, at the present time, I have been looking for that and I do not find it.

Mr. Bradish: That's what I suspected.

(Testimony of Thomas H. Stark.)

Mr. Packard: There is one thing further. I object on behalf of Lewis, that it isn't notice to my defendant. In other words I have that objection, Your Honor, and I believe the Court understands my position in that matter. It's hearsay insofar as—— [130]

The Court: This exhibit 26 will be admitted——

Mr. Packard: As against the defendant, Rexall——

The Court: I'll admit it generally at this time. We will set it aside later if I find it is not properly——

The Clerk: Plaintiff's Exhibit 26 is received in evidence.

(Thereupon, Plaintiff's Exhibit 26, heretofore marked for identification, is received in evidence and made a part of this record.)

Mr. Lanier: Counsel has already stipulated yesterday that they received notice from Rexall, your Honor. Now I again re-offer Plaintiff's Exhibit 2.

Mr. Bradish: Well, again I have to object to the offer of Plaintiff's Exhibit 2, and ask your Honor to again inspect the contents of what purports to be a copy of a letter dated July 5th, with Plaintiff's Exhibit No. 26, and I think your Honor will determine that they are identical except for the dates, one bearing August 8th, and the other bearing date of July 5th. This document, Plaintiff's 2 for [131] identification, is a copy, and there has been no foundation laid for the admission of secondary evidence.

(Testimony of Thomas H. Stark.)

Mr. Lanier: I repeat, your Honor, this witness has testified he received that letter, he testified he does not have the original in the file, a copy now becomes admissible.

Mr. Bradish: Your Honor, I must remind the Court this witness did not say that he received a copy of the letter dated July 5th. He said he received a copy of the letter, the contents of which is contained in Plaintiff's Exhibit No. 26. He didn't say he received a letter on July 5th.

Mr. Lanier: We could read his testimony back of yesterday, your Honor.

The Court: The Exhibit will be admitted.

The Clerk: Plaintiff's Exhibit 2 admitted in evidence.

(Thereupon, Plaintiff's Exhibit 2, heretofore marked for identification, is received in evidence and made a part of this record.) [132]

Mr. Packard: I would like the record to show I object on the same grounds heretofore stated.

The Court: It will so show.

Mr. Lanier: That's all Mr. Stark.

(Witness is excused.)

Mr. Bradish: Your Honor, I hate to press this matter, but a moment ago when you deferred ruling on the admission of Exhibit No. 2, you said you would defer it until such time as counsel could produce what he told us he could produce here, namely, an office copy of the letter bearing date of August 8th, and I wonder if your Honor will require counsel to do that at this time?

The Court: Do you have such copy?

Mr. Lanier: I have already stated, your Honor, that I can not locate the copy of the letter of August 8th. If I do so in my files later, I will certainly produce it.

The Court: All right. I'll let the ruling stand.

Mr. Lanier: At this time, may it please the Court, I would like to call the plaintiff, Sandra Mae Nihill.

Thereupon,

SANDRA MAE NIHILL

called as a witness in her own behalf, after being first duly sworn by the clerk, in answer to questions propounded, testified as follows, to-wit:

Direct Examination

By Mr. Lanier:

Now, Sandra, I want you to speak up clearly and loudly enough so that all the members of the jury and the reporter, can hear you.

Q. Would you state your full name please?

A. Sandra Mae Nihill.

Q. And where do you live, Sandra?

A. Kensal, North Dakota.

Q. How old are you now? A. Sixteen.

Q. At the time of the use of the Cara Nome home permanent, how old were you then?

A. Thirteen.

The Court: Now, listen, see that young man away over there on that far end—far corner—you're talking to him you know, because if he doesn't hear you, you won't get anything out of your evidence, and

(Testimony of Sandra Mae Nihill.)

this is your [134] case, and you talk up so he can hear you.

Q. (Mr. Lanier, resuming): What was your answer to your age at that time, Sandra?

A. Thirteen.

Q. Prior to that time, Sandra, had you ever had a home permanent wave? A. Yes.

Q. Was it or not successful? A. It was.

Q. How often had you had a wave?

A. I couldn't answer that.

Q. You do recall other instances prior to that of February 5, 1955? A. Yes.

Q. And any and all that you had, have been successful? A. Yes.

Q. Now, Sandra, also prior to February 5, 1955, what had been the general condition of your health?

A. Perfect health.

Q. You were not sick? A. No sir.

Q. Nor sickly? A. No sir.

Q. Requiring medical care? A. No sir.

Q. Had you ever had any diseases of the skin?

A. No, sir. [135]

Q. Have you ever been treated for any skin irritations or disturbances prior to February 5, 1955?

A. No.

Q. In what grade were you in February 5, 1955?

A. Eighth grade.

The Court: I couldn't hear you, even sitting this close.

The Witness: Eighth grade.

The Court: Keep your voice up as if you were

(Testimony of Sandra Mae Nihill.)

talking back there to your father, if that is your father sitting back there—that is, isn't it?

The Witness: My uncle.

The Court: Suppose you talk to your uncle back there and make him hear you, what you say.

Q. (Mr. Lanier, resuming): Now, Sandra, calling your attention to February 5, 1955, did you have occasion to go with your mother in to the town of Kensal? A. Yes.

Q. Where do you live from Kensal?

A. We live north about four and a half miles.

Q. On a farm? [136] A. Yes.

Q. And did you drive into Kensal with your mother? A. Yes.

Q. Did anyone else go with you?

A. No, sir.

Q. Where did you go in Kensal?

A. You mean the day we got——

Q. February 5, when you bought the permanent?

A. We went to the drug store.

Q. And what kind of a drug store is that?

A. Just a drug store I guess, it's got a little bit of everything.

Q. Is it or not a Rexall Drug Store?

A. Yes, sir.

Q. Is it the only drug store in Kensal?

A. Yes.

Q. And did you go there and make a purchase?

A. Yes, sir.

Q. And what did you buy?

A. Well we went in and bought the permanent.

(Testimony of Sandra Mae Nihill.)

Q. And what kind of permanent was it?

A. Pin curl Cara Nome.

Q. Did all of you hear that? Sandra they are not hearing. What kind of pin curl did you buy?

A. Cara Nome pin curl. [137]

Q. Fine. And was there, or not, a display in the store of this Cara Nome pin curl?

A. Yes, there was.

Q. Now, Sandra, I show you Plaintiff's Exhibit 7. Will you tell me, have you seen this exhibit before?

A. (Examining Exhibit 7) Yes, sir.

Q. And was that exhibit on the shelf in special display in the Rexall Drug Store in Kensal at the time you made your purchase?

Mr. Bradish: Just a minute. Your Honor, I have to object to that as being a little bit leading and suggesting.

The Court: Yes. Let the witness testify. Objection sustained, question stricken.

Q. (Mr. Lanier, resuming): Where did you first see Exhibit 7?

A. It was with the boxes of pin curls, it was located right there.

Q. In the Rexall Drug Store at Kensal——

A. Yes, sir.

Q. At the time you purchased it?

A. Yes, sir.

Q. And who gave you this Exhibit 7?

A. The druggist there.

Q. At the drug store? [138] A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. At the Rexall Drug?

Mr. Bradish: Just a minute. Again, I have got to object to counsel saying "at the Rexall Drug," insofar as he is calling for a conclusion of this witness as to the fact, or not the fact, that Rexall is the owner of the drug store. I think the evidence——

The Court: Well if it's known as the Rexall Drug Store, I'll deny the objection.

Mr. Bradish: We have no evidence to whether it's known as the Rexall Drug Store.

The Court: Well develop that fact, if you will.

Mr. Lanier: She already testified to that, your Honor.

Q. (Mr. Lanier, resuming): What is the name of this drug store in Kensal?

A. I believe it's——

The Court: Keep your voice up. You're just talking to your attorney there now. The jury must hear you.

Q. (Mr. Lanier, resuming): It's what, Sandra?

A. The only name I know is by the Rexall Drug.

Q. That's the only name you've ever known it by? All right. Now, did you take this Exhibit 7 home with you at the time of your purchase?

A. I believe so.

Mr. Lanier: At this time, may it please the Court, I offer this in evidence as Plaintiff's Exhibit 7.

Mr. Packard: What was the answer to that last question?

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: "I believe so."

Mr. Packard: I object, your Honor, if she believes so, there's not a proper foundation established.

Q. All right, Sandra, did you, or not, take Exhibit 7 home with you? A. Yes.

The Court: I didn't understand—her voice was so low. Before I rule on that—I didn't understand where she found it, it was somewhere about the store, but I didn't understand——

Mr. Lanier: She testified it was on display in the Rexall Store and was given to her by the druggist at the time of her purchase. [140]

The Court: Any objection to that statement into evidence?

Mr. Packard: Well, I'm objecting that it's hearsay insofar as Defendant Lewis is concerned.

The Court: You're offering it in evidence——

Mr. Lanier: I'm offering it, your Honor.

Mr. Bradish: I have no objection.

The Court: Admitted.

(Thereupon, Exhibit No. 7, previously marked for identification Plaintiff's Exhibit No. 7, was received in evidence and made a part of this record.)

The Clerk: Exhibit No. 7 admitted in evidence.

Mr. Lanier: Mark this for identification please.

(Thereupon, Plaintiff's Exhibit No. 28, is marked for identification by the Clerk.)

The Clerk: Plaintiff's Exhibit No. 28 is marked for identification.

(Testimony of Sandra Mae Nihill.)

Q. (Mr. Lanier, resuming): Now, Sandra, the jury is still complaining that they can not hear you. Now I know you can speak up louder than that. Will you do it? [141] A. I'll try.

Q. All right. Sandra, I show you Plaintiff's Exhibit 28, and ask you whether or not you have seen that exhibit before?

The Court: Now, you're talking to your lawyer back yonder and not the one standing beside you. You're got to get your voice up so they can hear you.

A. I believe that was in the box.

Q. Just answer yes or no first. A. Yes.

Q. All right. Now was it, or not, in the box you purchased? A. Yes, sir.

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit 28.

Mr. Bradish: Just a minute. (Counsel examines Exhibit 28.)

Mr. Packard: I have the same objection, your Honor, it's hearsay, no proper foundation, insofar as the defendant Arnold Lewis is concerned. No foundation. It's hearsay.

Mr. Bradish: I have no objection. [142]

The Court: It will be admitted.

(Thereupon, Plaintiff's Exhibit No. 28, heretofore marked for identification by the Clerk, was received in evidence and made a part of this record.)

The Clerk: Plaintiff's Exhibit 28 admitted.

Q. (Mr. Lanier, resuming): Now, Sandra, just

(Testimony of Sandra Mae Nihill.)

prior to February 5, 1955, that's before that date, did you or not have occasion to have your picture taken? A. Yes.

Q. And what was that occasion?

A. The school gets our picture taken once a year.

Q. So your picture was taken. Do you remember how long before February 5, 1955?

A. Well not exactly.

Q. Approximately how long?

A. About three weeks.

The Court: About what?

The Witness: About three weeks.

The Court: About three weeks?

The Witness: Yes, sir. [143]

Q. (Mr. Lanier, resuming): And, also, Sandra, did you have occasion in the seventh grade, the year before, to have your picture taken?

A. Yes, sir.

Q. Would you mark that please sir?

The Clerk: Plaintiff's Exhibit No. 29 marked for identification.

(Plaintiff's Exhibit No. 29 was marked for identification by the Clerk.)

Q. (Mr. Lanier, resuming): Sandra, I show you Plaintiff's Exhibit 29, and I ask you, first of all, is that, or not, a picture of you? A. Yes, sir.

Q. And what year was that picture taken?

A. In the seventh grade, the year before.

Q. It was the year before the incident with the home wave? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: May it please the Court, I offer into evidence Plaintiff's Exhibit 29.

(Counsel for defendants examine said exhibit.)

Mr. Bradish: I wonder, if the Court please, if we might have the [144] year that this was taken, whether it was in 1954, or 1953.

Mr. Lanier: She stated the year 1955, your Honor; therefore, it's——

The Court: Let her answer the question directly, what year?

Q. (Mr. Lanier, resuming): What year was this taken, Sandra? A. In '54.

The Court: Did you hear the answer? You better keep your voice up, Sandra; it's pretty hard to hear. You have a soft voice and you better keep it up.

Mr. Lanier: 29 is offered, your Honor.

The Court: Admitted.

(Thereupon, Plaintiff's Exhibit No. 29, heretofore marked for identification, was received in evidence and made a part of this record.)

Mr. Lanier: At this time, may it please the Court, I request permission to pass this to the jury.

(Counsel hands the photograph, Exhibit No. 29 to the jury.) [145]

Q. (Mr. Lanier, resuming): Now, Sandra, again calling your attention to February 5, 1955, where was the permanent given you?

A. At my home.

Q. At your farm home? A. Yes, sir.

Q. And what part of your home were you in

(Testimony of Sandra Mae Nihill.)

at the time it was given? A. The kitchen.

Q. Is there, or not, a clock in the kitchen?

A. Yes, there is.

Q. What kind of a clock is it?

A. Electric clock.

Q. And where, generally, does it set in the kitchen?

A. It's right above the sink on the wall.

Q. Are you hearing her now? Hold that voice up now Sandra. Who was present in the kitchen at the time the wave was given?

A. My mother and Mrs. Briss.

Q. Now, I believe, at the time the permanent was given her name was Mrs. Briss, is that correct?

A. Yes, sir.

Q. Did her husband subsequently die?

A. Yes, he died.

Q. At the time we took her deposition, was she, or not, remarried? [146] A. Yes, she was.

Q. And what is her name now and at the time of the taking of the deposition?

A. Mrs. Alfred Jorgenson.

Q. So when we are referring to Mrs. Briss, it may be either Mrs. Briss or Mrs. Jorgenson?

A. Yes, sir.

Q. They are the same person? Don't nod now.

A. Yes, sir.

Q. Who actually applied the permanent?

A. Mrs. Briss.

Q. And what part did your mother play in it?

(Testimony of Sandra Mae Nihill.)

A. Well Mom mostly watched the clock and timed it.

Q. And did you participate other than having the wave given to you?

A. Well I helped watch time too.

Q. Within the kit itself there is a set of instructions. Is that correct? A. Yes.

Q. As you sit in the stand there now, Sandra, do you, yourself, specifically remember what those instructions were? A. No.

Q. Would you look at the set of instructions which I have taken from Exhibit 1. Look at those instructions [147] and tell me whether or not it calls to mind that those seem to be the instructions which you read and used.

The Court: If you need to, to refresh your mind.

A. I believe they are the same, yes.

Q. You say you believe they are the same.

A. Yes.

Q. All right. Prior to the use of the wave, Sandra, did you, yourself, read the instructions?

A. Yes, sir.

Q. And where were the instructions throughout the course of the permanent waving?

A. They were right on the cabinet there so we could look at them and check the time.

Q. And did you look at them during the course of the wave? A. Yes, sir.

Q. You referred to them from time to time?

A. Yes, sir.

(Testimony of Sandra Mae Nihill.)

Q. Did you, or not, strictly follow out the instructions that came in the container?

Mr. Bradish: That's objected to as calling for her conclusion, as being a self-serving statement. I have no objection if he asks her what she did in connection with the application of this permanent wave. [148]

The Court: I think the objection is well taken.

Q. (Mr. Lanier, resuming): Now, during the course of the——

The Court: Pardon me. Was this marked as an exhibit?

Mr. Lanier: No, it's within an exhibit, your Honor; it's contained in Exhibit 1.

The Court: All right.

Q. (Mr. Lanier, resuming): During the course —scratch. The bottle containing the liquid of the permanent wave, the solution, were you present at the time that bottle was removed from the package?

A. Yes, sir.

Q. Did you see it removed? A. Yes.

Q. Was it sealed at the time it was removed from the package? A. Yes, sir.

Q. Was the seal broken in your presence?

A. Yes, sir.

Q. Do you remember by whom?

A. I believe Mrs. Briss broke it.

Q. Did you notice anything at all unusual about the bottle? [149]

Mr. Bradish: I've got to object to that because it calls for a conclusion as to what "unusual" is,

(Testimony of Sandra Mae Nihill.)

I don't know. We have no objection if he asks her what she noticed about the bottle or observed about its condition, but "unusual" would be her conclusion.

Mr. Packard: I join. There's no proper foundation laid to show that there was any other type of hair——

Mr. Lanier: She so testified she has had permanents before, your Honor.

Mr. Bradish: Well, not certainly with this same type of kit, and there's no foundation that the bottles used in the other kits were the same as this.

The Court: I think perhaps the objection is well taken. You are inserting there the problem for her to solve there——

Mr. Lanier: I'll rephrase it, your Honor.

The Court: All right. [150]

Q. (Mr. Lanier, resuming): What did you notice about the bottle, if anything?

A. Before we opened it?

Q. After you opened it?

A. It was rather strong smelling.

The Court: Keep your voice up; I couldn't even hear you. Could you hear her back there in the corner?

Juror: Yes, sir.

The Court: Will the reporter read the answer?

(Thereupon, the pending answer was read by the reporter.)

Q. (Mr. Lanier, resuming): Did you notice anything else about it?

(Testimony of Sandra Mae Nihill.)

A. After you smelled it your eyes started smarting a little bit.

Q. You did notice that your eyes smarted?

A. Yes.

Q. During the course of the using of the solution, was there ever any time that it was poured over your head?

A. If I remember right it was.

Q. And where were you at the time that that took place?

A. I was standing over the sink.

Q. And, did you have anything else with you for protection, while you were at the sink? [151]

A. Had a towel.

Q. And what were you doing with the towel?

A. Holding it over my eyes.

Q. Over your eyes? A. Yes.

Q. That evening, did you, or not, go to bed with the pin curls in your hair? A. Yes.

Q. The next morning, did you, or not, notice anything about the pin curls?

A. They were rusty.

Q. Now by "rusty," will you tell the jury what you mean? Describe it a little bit more in detail.

A. Well when we took them out the next morning they were kind of covered with a little bit of rust, kind of red colored.

The Court: Will it develop that the pin curlers were in the container? I didn't understand.

Mr. Lanier: They are in the package, in Exhibit 1, your Honor.

(Testimony of Sandra Mae Nihill.)

Q. (Mr. Lanier, resuming): Was that just some of them or was it all of them?

A. Well all of the curlers.

Q. Now, Sandra, thereafter, when did you first notice that you were losing hair?

A. Well about—I don't know, it started coming out when [152] we combed it.

Q. When. A. About a week afterwards.

Q. And how long did that continue?

A. It kept continuing; it just kept coming out all the time.

Q. Well for about how long.

A. Well all the time, until I didn't have anymore to comb.

Q. About when did you graduate, do you recall?

A. The last part of May.

Q. Was it still in the process of coming out at that time? A. Yes.

Q. And when did you first go to see Dr. Martin?

A. I don't remember the date.

Q. Do you know about when you went?

A. It was about two weeks or so after we got the permanent when I first noticed it coming out.

The Court: About how long?

The Witness: About two weeks.

Q. (Mr. Lanier, resuming): After you noticed it coming out? A. Yes, sir. [153]

Q. And if Dr. Martin testifies that that was February 28th, does that sound about right to you?

A. Yes, sir.

(Testimony of Sandra Mae Nihill.)

Q. What did Dr. Martin give you to use, if you know? A. I don't remember the name.

Q. Did he give you something? A. Yes, sir.

Q. And did you use it? A. Yes, sir.

Q. As per his directions? A. Yes, sir.

Q. Did it, or not, help you in stopping any of the falling out? A. No, sir.

Q. About when was it that you had your Confirmation that Summer?

A. It was in June; about the first half of June.

Q. What was the condition of your hair at that time?

A. It was just about all gone. It was gone I guess.

Q. And is that about the first time that it was obviously gone? A. Yes.

Q. Do you remember when you went back to Dr. Martin? A. No I don't remember.

Q. If he testifies that it was July 5, does that sound about right? [154] A. Yes.

Q. And, as a result of that visit with Dr. Martin, did you, or not, eventually go in 150 miles to Fargo and see Dr. Melton? A. Yes.

Q. And you were under his care then for how long? A. I couldn't tell you that.

Q. You just don't know? A. No, sir.

Q. Did he prescribe any treatment for you?

A. I can't remember.

Q. Do you recall——

The Court: Wait a minute; what was her answer?

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: "I can't remember."

The Court: Keep your voice up, Sandra please.

Q. (Mr. Lanier resuming): Do you recall what instruction he gave you and what he told you the last time you were in?

Mr. Packard: Just a minute. I object to that on the ground it's leading, suggesting, it calls for her conclusion; there's no proper foundation laid that he gave any instruction. [155]

Mr. Bradish: And I object on the further ground that it is hearsay so far as this defendant is concerned.

The Court: Overruled. She may answer.

A. Well one time we went in to see him, he told me to go out in the sun and not to burn it though.

Q. By the way, Sandra, that brings up something that I had forgotten, have you ever in your life, at any time, applied any peroxide or any other bleaching agent to your hair? A. No.

Q. Have you ever used any hair dye or any other chemical in your hair? A. No, sir.

The Court: Did I understand you to say that Dr. Melton advised you to stay out in the sun?

The Witness: To go out in it.

The Court: To go out in the sun. I wasn't sure if it was to go in or stay out. All right proceed.

Q. (Mr. Lanier, resuming): Now, Sandra, at this time I wish you would please remove your kerchief.

(The witness removed a scarf which up to now was covering her head.)

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: Now, at this time also, your Honor, I don't want to embarrass the Court nor Sandra nor the jury nor counsel, any more than I have to, but because of the nature of the case, I am going to request that Sandra be allowed to walk, head down, in front of the jury, so that the jury can see, and if one of the ladies in the jury does not mind I would like for one of the jurors, at least, to examine the texture of this hair that is on Sandra's head. May I have that permission, your Honor?

Mr. Bradish: I am going to object to the jury examining the texture. It would seem to me that would be the proper subject of expert testimony.

The Court: I'll permit her to walk in front of the jury and exhibit her head in any way at all before the jury, but not permit the jury to touch or examine by manual—— [157]

Mr. Lanier: Thank you, your Honor. Sandra, would you step down here please? Walk just slowly, across the front.

(The witness left the witness stand and walked slowly across in front of the jury box, from one end to the other.)

Mr. Lanier: Now you can come on back and get in the chair.

Mr. Packard: I would like to take a look myself, if I may.

Mr. Lanier: You sure may.

(Mr. Packard and Mr. Bradish, attorneys for the defendants, also looked at the hair on plaintiff's head.)

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: You can just be seated Sandra.

(The witness resumed the witness stand.)

Q. (Mr. Lanier, resuming): Sandra, a few months ago, did you, or not, in Minneapolis, purchase a wig? A. Yes.

Q. And have you or not from time to time worn it and tried to wear it? A. Yes, sir.

Q. I ask you Sandra—one moment—I would like to request permission of the court and opposing counsel not to [158] mark this exhibit, because I do not want to put it in evidence because it is still usable.

Mr. Packard: I'll stipulate it may be withdrawn at the conclusion of the trial. I think the clerk should stamp it or in some way identify it.

Mr. Bradish: Does this young lady want to use it during the trial? If she does, I have no objection so long as it's here during the trial.

Mr. Lanier: I don't think she will use it during the trial. If counsel wants it marked I have no choice, I'll mark it.

Mr. Packard: No, I'm not insisting that it be marked, I don't mean that——

The Court: Well, it can be understood, can it not, that it's available for her use if she wants it?

Mr. Bradish: Yes, at any time.

Mr. Packard: Yes, sir.

Q. (Mr. Lanier, resuming): Sandra, I ask you whether—— [159]

The Court: So the record will be clear, it must be here at the time the matter is presented to the jury during argument.

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: All right, your Honor.

Q. (Mr. Lanier, resuming): I ask you whether or not that is the wig that was purchased?

A. Yes.

Q. Sandra, would you put it on please?

(The witness puts the wig on her head.)

Q. Sandra, where was that wig purchased?

A. In Minneapolis.

The Court: Voice up again, I couldn't hear you. I want to make sure the jury hears you—where?

The Witness: In Minneapolis.

The Court: In Minneapolis.

Q. (Mr. Lanier, resuming): And was that wig a stock wig or was it made up particularly for you?

A. Oh, I think they had it, it was already made.

Q. It was already made. And what was the cost of that wig, Sandra? A. $135.00. [160]

The Court: What?

The Witness: $135.00.

Q. (Mr. Lanier, resuming): Do you have any difficulty with it, Sandra? A. Yes.

Q. Would you tell the jury what happens when you go outdoors with it?

A. Well if it's windy it blows off.

Q. Have you been able to take care of it and keep it presentable?

A. I have to fix it all the time.

Q. All right. Now, Sandra, as a result of this—scratch. What year are you in high school now, Sandra?

A. Eleventh grade, junior high.

(Testimony of Sandra Mae Nihill.)

Q. So that next year you graduate?

A. Yes.

Q. As a result of this Sandra, has it, or not, caused you embarrassment? A. Yes.

Q. Has it hurt you? A. Yes.

Q. Sandra, do you have any boy friends? [161]

A. No.

Mr. Lanier: Your witness.

The Court: This may take a little time, perhaps I better let the jury withdraw for their convenience and try to be back in the box in ten minutes, if you can please. The jury will withdraw.

(Thereupon, a fifteen minute recess was taken, and, thereafter, the following proceeding were had in open Court:)

SANDRA NIHILL

resumes the witness stand for cross examination, as follows:

Cross Examination

Q. (By Mr. Packard): Sandra, when is the last time you saw a doctor for any type of examination to the scalp or your hair? I understand, yesterday, at about one o'clock, at my request, you saw a Dr. Harvey Starr, dermatologist in this city. Is that correct? A. Yes, sir.

Q. Now, before you saw Dr. Starr, who is the last doctor that saw you, either for an examination or treatment, before you saw Dr. Starr yesterday?

A. Dr. Levitt. [162]

Q. And is he located in Beverly Hills?

(Testimony of Sandra Mae Nihill.)

A. I believe so.

Q. And when did you see Dr. Levitt?

A. The days have been going too fast, I don't remember.

The Court: I don't think that anybody can hear you hardly. I can't. The lady there next to the end says she can't hear you, so make those jurors hear you so they will know what you are talking about. They have to pass on this case finally and if they don't know what you are talking about they won't have anything to think about. Keep your voice up. Make your uncle hear you back there, and your folks.

Q. (Mr. Packard, resuming): Sandra, as I understand, you live in North Dakota, is that correct? A. Yes.

Q. That's Kensal, North Dakota? A. Yes.

Q. And for the purpose of this trial you came out here to Los Angeles. When did you arrive in Los Angeles? A. Thursday.

Q. Thursday. Then after you arrived here, you saw a Dr. Levitt in Beverly Hills for the purpose of examining your hair and scalp. Is that correct?

A. Yes. [163]

Q. And was it since you arrived?

A. Yes, sir.

Q. And did Dr. Levitt prescribe any treatment to you? A. No.

Q. In other words, you went in there merely for an examination, he examined your scalp and your hair. Is that correct? A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. And was your attorney present at that time?

A. I don't think he was.

Q. Did he go with you to Dr. Levitt's office?

A. I don't know, everything has been——

Q. You mean to tell me you don't recall whether Mr. Lanier or Mr. Rourke here accompanied you to Dr. Levitt's office in Beverly Hills or not?

Mr. Lanier: I don't think she understands your question.

Mr. Packard: Well I think it's clear.

Mr. Lanier: Whether I was there during his examination or just while I was in the office with her.

Mr. Packard: The question was, I asked whether Mr. Lanier accompanied her to Dr. Levitt's office in Beverly Hills within the last three or four days. Now do you understand that question, Sandra?

A. Yes. [164]

Q. And do you recall, at this time, whether your attorney accompanied you to Dr. Levitt's office or not? A. Yes, he did.

Q. He was with you? A. Yes.

Q. And at that time, did your attorney have a conversation with Dr. Levitt in your presence?

A. Not in my presence, no.

Q. And he talked to the doctor alone, is that correct? A. Yes.

Q. Now, prior to, or before, you saw Doctor——

The Court: May I suggest, so as to make this whole matter clear, that you ask her further whether the attorney was with her when the doctor

(Testimony of Sandra Mae Nihill.)

actually made the examination, or in the office, or the examining room?

Q. (Mr. Packard, resuming): Was your attorney present in the examining room?

A. No, sir.

The Court: I didn't know anything about it, but I thought in fairness to her it should be brought out.

Mr. Packard: I understood she said he was not there; that he was [165] there in the office but not in the examining room.

The Court: Well I didn't know.

Q. (Mr. Packard, resuming): Now, before you saw Dr. Levitt, who was the last doctor you saw for any type of treatment before that?

A. You mean an examination?

Q. Any type of examination or treatment, before you saw Dr. Levitt?

A. It would be Dr. Martin when we had our basket ball examination.

Q. Dr. Martin is your local home town doctor in Kensal, North Dakota, is that correct?

A. Yes.

Q. And before you saw Doctor—the last doctor you saw before Dr. Levitt, was Dr. Martin. Is that correct? A. Yes, sir.

Q. And what was the date of that examination or visit to Dr. Martin's office?

A. I couldn't tell you.

Q. You say that was for an examination in connection with a basket ball tournament in which you

(Testimony of Sandra Mae Nihill.)

were playing for the high school in Kensal, North Dakota? A. Yes, sir.

Q. And was that sometime this year?

A. Yes, sir. [166]

Q. How often do you have these tournaments?

A. Well, the tournament we have at the end of the basket ball season.

Q. In other words, after the regular basket ball season, you have a tournament between the various schools there which I imagine takes a couple of days to play off. Is that correct? A. Yes, sir.

Q. And before these tournaments, you received a medical examination, or examination by Dr. Martin, all the girls on the team, is that a correct statement? A. Yes, sir.

Q. I'm trying to correlate this and go back. As I recall your testimony, you have seen Dr. Martin approximately one week before you received this home permanent in 1955, for an examination before the basket ball tournament at that time. Is that correct? A. Yes, sir.

Q. And I take it then that since 1955, you have been playing basket ball on your local high school team, and prior to or before these tournaments, Dr. Martin examines all the girls on the team?

A. Yes, sir.

Q. And that then took place sometime probably in February, is that correct?

A. Approximately. [167]

Q. So, then, does that refresh your recollection that, in all probability, the last time you saw Dr.

(Testimony of Sandra Mae Nihill.)

Martin was sometime in February of this year, at which time he examined you for this basket ball tournament? A. Yes, sir.

Q. And I take it then that in 1956 and 1957, you received a like examination from Dr. Martin just before this basket ball tournament?

A. Yes, sir.

Q. Now, at the time you were examined by Dr. Martin—strike that—at the time you were examined by Dr. Martin in February this year, that was merely an examination so that you could play basket ball in this tourament?

A. Well, it was general.

Q. Yes. He didn't prescribe any treatment to you insofar as your hair was concerned, did he?

A. No, sir.

Q. When was the last time—strike that. Now, I take it from time to time, you go to a barber for a neck trim, to trim your hair? A. No, sir.

Q. Is it your testimony that you have not been to any barber since February 1955?

A. I don't believe I went to a barber—— [168]

The Court: I don't believe the reporter can hear you.

A. I don't believe I went to a barber at that time.

Q. What I'm getting at, have you been to any barber? A. No, sir, not a barber.

Q. Well, I take it that some member of the family or somebody, does the chores in Kensal, North Dakota, for members of the family insofar as hair-do's and hair-cuts. Is that correct? In your

(Testimony of Sandra Mae Nihill.)

immediate family, does somebody pick up the scissors, the shears, for your brothers or your sisters and so forth? A. No.

Q. Do you go to a barber, your brothers or sisters? A. Well, my brothers go to barbers.

Q. All right. Now how about yourself——

The Court: Do I understand that question and answer to be—I think I do—you asked her if she had been to a barber, a professional barber I assume you meant?

Mr. Packard: Yes, sir.

The Court: Since February 5, 1955.

Mr. Packard: That is right. [169]

The Court: And her answer was "no"?

Mr. Packard: That is correct.

The Court: All right, proceed.

Q. (Mr. Packard, resuming): Now, has anybody, including yourself, trimmed your hair or cut your hair at any time since February 5, 1955?

A. No, sir.

Q. And it's your testimony that there has never been a scissors or shears used upon your hair since February 5, 1955. Is that a correct statement, Sandra? A. Yes.

Q. Now, I believe you have stated that prior to, or before February 5, 1955, you had used other home permanents, or somebody had given you a cold wave permanent. Is that correct?

A. Yes, sir.

Mr. Lanier: Speak up, Sandra. You are getting a little low again.

(Testimony of Sandra Mae Nihill.)

Mr. Packard: Where is that picture, the photo? Now, let me [170] ask you, Sandra, prior to or before you had this home permanent, was your hair naturally straight or curly?

A. Straight.

Q. It was naturally straight, is that correct. And I show you a photograph which I believe the testimony is was taken in 1954, when you were in the seventh grade, and it has been marked "Plaintiff's No. 29". I call your attention to that photograph and ask you if that photograph was taken immediately after, soon after, you had received a home permanent or some type of permanent?

A. Yes, it was.

Q. And do you know at that time, the type of home permanent you had received?

A. On that picture?

Q. Yes. A. That was a Toni.

Q. That was a Toni. Do you know what type of Toni home wave? A. No, I don't.

Q. Where did you purchase the Toni?

A. I can't remember that either.

Q. Did you purchase it at the same drug store in Kensal?

A. I really don't remember. [171]

Q. Did you personally purchase it?

A. It's too far back.

Q. You don't have any recollection?

A. No, sir.

Q. But you are certain that it was a Toni?

A. Yes, sir.

(Testimony of Sandra Mae Nihill.)

Q. Do you recall reading the directions in the Toni kit? A. Yes.

Q. Was there a specific type of Toni wave that you purchased? A. I don't remember.

Q. Well, this particular Cara Nome pin curl permanent, were you aware of the fact that there were different types of home cold wave permanents put out under the name of "Cara Nome"?

A. I never really looked at permanents before.

Q. You didn't look at the box you mean?

A. Well we looked at the different brands, yes.

Q. And is it your testimony there were different brands at the Kensal Drug Store?

A. There were different brands of permanents, yes.

Q. And you selected—what I'm asking you now, were you aware of the fact that they had different types of Cara Nome home cold wave permanents?

A. I don't remember.

Q. What I am getting at, this is a pin curl permanent, which is to curl the ends, and they have a natural, and they have a mild one, and they have various types of Cara Nome cold wave permanents, and I am wondering whether you examined the various types before you selected the pincurl permanent?

A. Well we went in with the idea of getting a pincurl.

Q. And you say you went in with the idea of getting the pincurl, so when you went in there you had in mind what you were going to purchase at

(Testimony of Sandra Mae Nihill.)

that time. Is that correct? A. Yes, sir.

Q. And was that by reason of the fact that somebody had recommended this particular type of pincurl to you? A. No.

Q. In other words, you had heard about it, is that correct? A. Yes.

Q. And you had heard about it before you went in to the drug store in Kensal, North Dakota—you were aware of it before you went in, that's correct isn't it, Sandra? Is that correct?

A. I guess so. [173]

Q. All right. Now, from where did you obtain your source of information relative to this particular type of home permanent before you went in to the drug store?

A. I couldn't tell you.

Q. You don't recall? A. No.

Q. All you recall you went in to buy this particular brand—right?

A. We went in to get a pincurl.

Q. Yes, you wanted to get a pincurl, and you realized that there is a difference between receiving a regular pincurl permanent and a natural permanent? A. Yes.

Q. And I take it that you had had these cold wave permanents before? A. Yes.

Q. And had you had any other type other than a pincurl? A. Yes, sir, we had.

Q. And what type of permanent—when I say "type of permanent", what type relative to whether it was a pincurl or whether you blocked your hair

(Testimony of Sandra Mae Nihill.)

off and had a full-head—do you understand—permanent—what type was it in that picture, Plaintiff's No. 29? [174]

A. Well they had some kind of little curlers.

Q. They had some plastic curlers that you wound your hair around, those plastic curlers, is that correct? A. Yes.

Q. And the last permanent you received with these plastic curlers—strike that, I don't believe that was the evidence—was the last permanent you received prior to or before February 5, 1955, given with plastic curlers? A. Yes, sir.

Q. And do you know what brand that was?

A. That was a Toni.

Q. Now, was that the same one at the time your picture was taken?

A. On that picture there?

Q. Yes? A. Yes.

Q. Now, by whom were you given this?

A. Mrs. Briss and my mother.

Q. The same two ladies that were present there at the time you received this cold wave on February 5, 1955? Is that correct?

A. Yes, sir.

Q. Did you read the instructions yourself?

A. On which one?

Q. On the Toni? A. Yes.

Q. And were you familiar with the instructions on the Toni at the time you had this Cara Nome?

A. I couldn't you what they were.

Q. Did you personally read all the instructions?

(Testimony of Sandra Mae Nihill.)

A. Well everybody read them.

Q. Everybody——

The Court: You are referring now to which one?

Q. Did you personally read the instructions on the Cara Nome? A. Yes.

Q. And you say everybody read them, did——

A. I meant mom and Mrs. Briss.

Q. Did they read them out loud?

A. Yes.

Q. And who read it out loud?

A. Mrs. Briss.

Q. And then you read it yourself?

A. Yes.

Q. Did you see your mother read it herself?

A. Yes.

Q. Now did you completely read the instructions before the cold wave was commenced? [176]

A. Yes.

Q. Did your mother, to the best of your knowledge, completely read the instructions before the cold wave was commenced? A. Yes.

Q. Did Mrs. Bliss read it out loud before the cold wave was commenced? A. Yes, sir.

Q. Now, going back to the Toni, was the same procedure followed insofar as the giving to you of the cold wave at that time, relative to the instructions, I'm referring to?

A. Well they read them.

Q. You are aware that they had read them. Did they read them out loud?

(Testimony of Sandra Mae Nihill.)

A. I don't remember that.

Q. Now, at the time that you received the Toni, that wave differed from this Cara Nome in that on the Cara Nome your hair was placed in pincurls, where in the Toni, it was placed over these rollers —plastic deals—is that correct? A. Yes.

Q. And at the time you received the Toni, your hair was more or less blocked off. Isn't that correct? In blocks, and then wrapped around these rollers? [177]

A. I couldn't tell you sir.

Q. You don't recall. Then, is it your testimony that the only home permanent cold wave before the one on February 5, 1955, was a Toni?

A. That's the only brand I can remember.

Q. You may have had others, but you don't recall, is that correct?

A. (Nods head affirmatively.)

Q. In other words, if you had some others which you don't recall, you at least don't recall the name being other than "Toni". Is that a correct statement? A. Yes.

Q. And, as I understand it, you had this home permanent because you were going to play in this basketball tournament and you wanted your hair to look nice because you were going to play in the basketball tournament. Is that correct?

A. Yes.

Q. And was this a girls' team? A. Yes.

Q. This was one of the big occasions, is that

(Testimony of Sandra Mae Nihill.)

correct, in North Dakota, as far as social activities and athletic activities at school?

A. Well we always have them. [178]

Q. And you looked forward to it, is that correct? You had looked forward to it?

Mr. Lanier: If the Court please, I'm going to object to this as cluttering the record, being totally immaterial. I've listened for quite awhile and it's just getting to be repetitious and serves no purpose in this lawsuit.

The Court: Well, treat the matter briefly——

Mr. Packard: I have a purpose, Your Honor, in mind.

The Court: Very well, proceed.

Q. (Mr. Packard, resuming): Is that correct, that you looked forward to this for sometime—these tournaments every year?

A. Well we always look forward to them.

Q. Now, do you recall that while you were being given this home permanent—now I'm talking at all times about the Cara Nome, I'm not talking about the Toni any more, you understand that, Sandra?

A. Yes.

Q. At the time you were receiving this home permanent on February 5, 1955, do you recall holding a towel over your forehead? [179]

A. Yes.

Q. And there wasn't any of the solution that got into your eyes, was there?

A. I don't really recall; the towel was on.

(Testimony of Sandra Mae Nihill.)

The Court: I can't hear you. Keep your voice up.

Mr. Packard: Have the depositions been filed counsel?

The Court: They are on my desk I think.

Mr. Packard: I would like to use a deposition at this time.

(Thereupon, the clerk left the court-room and went into the Judge's Chambers and returned with the depositions in question.)

Q. After your hair commenced to break off and you had this trouble with your hair, do you recall also that your eye lashes fell out?

A. My eyebrows fell out.

Q. Do you recall your eye lashes had fallen out at the time that you went to see Dr. Michaelson in Minneapolis? A. It become awful thin.

Q. Will you please speak up Sandra because the jurors here are having a difficult time hearing you and it's difficult for me to hear you sometimes. I'm asking you [180] about your eye lashes now?

A. Well they become awful thin.

Q. They thinned out, is that correct? There definitely was a change in your eye lashes after this trouble to your hair? A. Yes.

Q. Now, I——

The Court: Pardon me. Do I understand that your eyebrows come out?

The Witness: Yes.

The Court: Entirely?

The Witness: Well, yes.

(Testimony of Sandra Mae Nihill.)

The Court: But your eye lashes only in part, is that right?

The Witness: Umhum.

Mr. Packard: Well I'm not sure Your Honor; she didn't say, she said that her recollection was, well let me ask——

The Court: She said they thinned out. [181]

Mr. Packard: The record will speak of itself.

The Court: I'll speak for it too, when I want to, counsel.

Q. (Mr. Packard, resuming): All right, now, do you recall, when you went to Dr. Michaelson that your eye lashes had practically all fallen out. Do you recall that?

A. No, sir, I can't.

Q. But——

The Court: Do you wish to have these depositions opened at this time?

Mr. Packard: Yes, I would like the deposition of—well we might as well have all of them open——

The Court: Do you have any objection to having all of them being opened?

Mr. Lanier: I have no objection to their being opened.

The Court: Open all of them.

(Thereupon, the Clerk opened the depositions which had been in sealed envelopes up to this time.) [182]

Mr. Packard: Counsel, will you stipulate that the necessary foundation has been laid for the purpose of reading the deposition, or do you wish for

(Testimony of Sandra Mae Nihill.)

me to approach the stand and confront the witness with her deposition?

Mr. Lanier: Well, now, may it please the Court, I don't know exactly what counsel wants me to stipulate to. Under the Federal Rules, of course, all depositions are admissible unto either party. If he wants to offer the entire deposition and read it, I have no objection. If he wants to go question and answer, I have no objection at all. Do you want to offer the deposition, counsel, or——

Mr. Packard: I'm not offering it; I'm using them for impeachment purposes, Your Honor, at this time. Do you stipulate that I may use a copy——

Mr. Lanier: Yes, so far as reading from it.

Q. (Mr. Packard, resuming): Sandra, I show you your deposition which was taken in Jamestown, North Dakota, August 1, 1957, and I show you therefrom, on page 8 commencing on line 18——

Mr. Lanier: May it please the Court, I now object to this form of [183] questioning. I object to the form of it as being an improper method of impeachment and, as counsel well knows, he can read the question and answer and ask her if she made such question and gave such answer.

The Court: That's the usual procedure.

Mr. Packard: I'm asking her first to read it to herself, without saying anything, and then I'm going to read it. I'm laying the foundation. Counsel would not stipulate that the foundation had been laid.

(Testimony of Sandra Mae Nihill.)

The Court: I thought he had stipulated. He said you could use your copy for impeachment purposes.

Mr. Lanier: I have no objection, Your Honor, to any foundation or anything else. He can put the whole deposition in, but if he is using it for impeachment, which he has a right to do, I only want him to do it in the proper way.

Mr. Packard: That's what I'm doing, in the proper way, Your Honor.

Mr. Lanier: I object to it, Your Honor. [184]

The Court: Well, ask her——

Mr. Packard: May I proceed, Your Honor.

The Court: You may ask her the questions.

Mr. Packard: I'm going to ask her to read to herself those questions and then I'm going to ask her whether those questions——

The Court: There has been an objection made, so we'll sustain the objection.

Q. (Mr. Packard, resuming): Do you recall that at the time your deposition was taken, Sandra, August 1, 1957, in Jamestown, North Dakota, that you were asked the following question—I'm reading from page 8, line 18—

"And where did you hold the towel?"

Answer—"I tried holding it over my eyes."

Question—"And did you get any of the solution in your eyes?"

Answer—"Well, not in them." [185]

Do you recall being asked those questions and giving those answers at the time your deposition was taken?

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: Now, may it please the Court, I object. Obviously being used for the purpose of impeachment and I have no idea what possible impeachment purposes——

Mr. Packard: Well that's a question for the jury to determine.

Mr. Lanier: There is no testimony by this witness to the contrary, your Honor.

Mr. Packard: She said she doesn't recall whether any of it got in her eyes or not. I think it's a question for——

The Court: Well, I'll permit the question and answer to be put to the witness.

Mr. Packard: Your Honor, I have just——

The Court: I say I'll permit; I'll permit it; go ahead.

Mr. Packard: Do you want me to reframe the question?

The Court: No, no; no. Your question is already put——

Mr. Packard: I didn't get an answer. [186]

The Court: All right Sandra, answer the question? A. Yes.

The Court: She says yes. Now you understand that you are saying that those questions were asked of you and you gave those answers?

The Witness: Yes.

The Court: All right, Mr. Packard.

Q. (Mr. Packard, resuming): Now at the time that you received this cold wave on February 5, 1955, did you have any feeling or sensation, burn-

(Testimony of Sandra Mae Nihill.)

ing sensation or any sensation of the solution being on your head?

A. On my head, no sir.

Q. You didn't have any burning sensation or feeling while it was being given to you?

A. No.

Q. Now, I believe you stated that you let the pincurls on all night. Is that correct?

A. Yes, after we rinsed it we left it on all night.

Q. And the last thing that occurred was that the solution was poured on your head and then after it stood a certain period of time then it was washed off. Is that correct? [187]

A. I can't recall——

The Court: Well I can't tell what you're saying at all.

The Witness: Well I can't recall the directions exactly.

Q. Well I'm not asking you to tell me what the directions are; I'm asking you to tell me what you best recall at this time of what took place at the time this cold wave was given to you. Do you understand that, Sandra?

The Court: Frame the question again, and see if she can't answer it.

Q. My question was, I believe you testified on direct examination that the last thing that was done, so far as giving the whole home permanent, was that the solution was poured all over your head, stood for a certain period of time and then

(Testimony of Sandra Mae Nihill.)

it was rinsed off, washed off, and then you permitted the pincurls to remain in your hair all night. A. I believe that's right.

The Court: Let me get it straight. Do I understand the pincurls were put in subsequent to the rinsing and then permitted to stay all night, or were they put in previous to the rinsing? [188]

A. I believe we took them out and then rinsed it.

The Court: Took them out and then rinsed it, all right.

Q. (Mr. Packard, resuming): Do you definitely recall taking the pincurls out?

A. Well it seems to me—well I don't recall exactly.

Q. In other words the pincurls, your hair was placed in pincurls with these bobby curls before anything was done? When I say that, was your hair shampooed first?

A. Well the directions says to shampoo it.

Q. Well I'm not asking you what the directions says Sandra. I'm asking you, did you shampoo your hair? A. Yes.

Q. And what type of shampoo did you use?

A. I don't remember.

Q. Did you use a shampoo out of a bottle or did you use a soap. When I say a soap, I realize soap comes in bottles, but I mean a cake soap, or did you use some type of shampoo out of a bottle?

A. I believe it was out of a bottle.

(Testimony of Sandra Mae Nihill.)

Q. Do you recall whether it was out of a bottle, or a cake?

A. I never used a cake, so it must have been out of a bottle.

Q. Now, was your hair trimmed or cut at any time before [189] you were given this home permanent? A. I don't remember.

Q. You don't recall whether your mother or Mrs. Briss cut your hair, cut the ends off?

A. No.

Q. Then——

The Court: The answer is you don't remember, is that right?

The Witness: Yes.

The Court: All right. Proceed.

Q. (Mr. Packard, resuming): Then, as I understand, your hair was shampooed, and then was it dried? A. I believe it was.

Q. And whereabouts was your hair shampooed?

A. In the kitchen.

Q. And who shampooed your hair?

A. I did.

Q. You shampooed it yourself?

A. Yes, sir.

Q. Was your mother and Mrs. Briss present at that time? A. Yes.

Q. And what were they doing at that time?

A. I couldn't tell you that. [190]

Q. Then did you dry your hair yourself?

A. Yes.

Q. Then after your hair was dry, it was put up

(Testimony of Sandra Mae Nihill.)

in these pincurls with bobby pins, is that correct?

A. Yes, I guess it was.

Q. I'm not asking you to guess; if you don't recall, you can say you don't recall Sandra. Do you recall? A. No, sir.

Q. In other words, you don't recall whether your hair was put up with the bobby pins before any solution was put on or not, is that correct; you don't recall at this time? A. No.

Q. That is a correct statement I made?

A. Yes.

Q. You will have to speak up. In other words my statement was correct, is that correct?

A. Yes.

Q. Did you observe the mixing of any of this solution? A. Yes, I watched it.

Q. Now the solution that was put on your head, was this out of the bottle?

A. I couldn't tell you.

Q. You don't recall. You don't know what they poured it on your head out of? [191]

A. No, sir.

Q. Now, do you recall that during the giving of this permanent to you, there was some discussion that there had been an error in the timing?

A. Well the only error was we were going to start rinsing it before the time was up.

Q. You recall that they started rinsing it, or doing something, before the time was up and then they permitted the solution to remain on your hair fifteen more minutes. Do you recall that?

(Testimony of Sandra Mae Nihill.)

A. No, sir.

Q. How long was it?

A. Well they were going to start, and it was about two minutes before the time to rinse, and they didn't start, they just waited until the time was up.

Q. You don't recall anything about fifteen minutes? A. No, sir.

Q. If Mrs. Briss gave a statement "I started to rinse——

Mr. Lanier: One moment. One moment, may it please the Court. I object to any statement, not in evidence, being given by Mrs. Briss, until such statement is in evidence.

Mr. Packard: I'll offer the statement in evidence at this time.

Mr. Lanier: Objected to, there is no foundation laid. [192]

The Court: Objection sustained at this time. I assume you intend to use Mrs. Briss.

Mr. Packard: I thought Mrs. Briss, you said, was going to be here.

Mr. Lanier: You thought I said Mrs. Briss was going to be here, yet I take her deposition. Her deposition is here and in due time it will go into the record, counsel.

Mr. Packard: I have notice in my file, you said Mrs. Briss would be here.

Mr. Lanier: You have no notes in your file, gotten from me, that Mrs. Briss would be here. That is why I took her deposition in North Dakota.

(Testimony of Sandra Mae Nihill.)

Your North Dakota counsel are well aware of that fact. I didn't take a deposition of Sandra, I didn't take one of her mother, because they were going to be here. The rest were taken.

Mr. Packard: I have a letter, you said all witnesses would arrive April first——

Mr. Lanier: All witnesses would arrive April first. All witnesses [193] did arrive April first. Did you think I was bringing my doctor——

Mr. Packard: I am entitled to ask this witness as to whether—just one second. (Counsel confers with Mr. Bradish.)

Q. (Mr. Packard, resuming): Did you hear Mrs. Briss make the statement that she was fifteen minutes off on her timing, therefore——

Mr. Lanier: One moment——

The Court: Just let him finish his question.

Q. (Mr. Packard, continuing): Do you recall Mrs. Briss making the statement that she was fifteen minutes off on her timing; that she started to rinse your hair, do you recall her making that statement?

The Court: Don't answer that, don't answer that please.

Mr. Lanier: One moment, if the Court please, because counsel has now made this statement, I am going to withdraw my objection to this one question only and allow her to answer it, but by doing that I don't waive my objection to this line of testimony. [194]

The Court: Well, I think this is a proper ques-

(Testimony of Sandra Mae Nihill.)

tioning because it's an effort to refresh the mind of the witness and if she didn't hear it or if she still says "no," why she has a right to say that, but if it refreshes her mind and she does want to make a different statement about that, then she has the opportunity.

Mr. Lanier: My point is this, your Honor, we have here the deposition of Mrs. Briss, Mrs. Adaline Jorgenson. Counsel's office was represented by competent counsel, she was cross examined, examined, re-examined and re-crossed. The whole deposition of her testimony is here and there is no such ridiculous statement as fifteen minutes on anything and they had the opportunity——

Mr. Packard: Well I have a statement from her. If counsel makes such statement, I'll stipulate that her statement can go into evidence. I have a notarized statement——

Mr. Lanier: Of course that would be objected to, your Honor.

The Court: Not unless it's in the deposition, Mr. Packard, I [195] don't think you are entitled——

Mr. Packard: Counsel says there isn't any such statement and he made that statement in front of the jury and I have the statement right here, if he wants——

Mr. Lanier: I'm not interested in counsel's statement. There is no opportunity for cross examination or explanation. Counsel well knows it, he has been trying lawsuits enough. He has the deposition and that's all he can use.

(Testimony of Sandra Mae Nihill.)

The Court: I still think he, if he thinks and if he believes and if he knows—anyway you put it —that she made, or if he has a strong belief that she made such a statement, then I think he has the right to ask her if she heard her make that statement.

Mr. Lanier: I have no objection to that one question, your Honor. I'll withdraw my objection.

The Court: All right. Then, let's proceed.

Q. (Mr. Packard, resuming): Did you at any time hear Mrs. Briss make the statement "We just followed the directions on the permanent box, [196] washed her hair first and put her hair up in pin curls and put in the solution like it called for. I started rinsing it out fifteen minutes before it was supposed to. I happened to think about the time before I got it all rinsed out and then I left the rest in until the time was up." Now, do you recall Mrs. Briss ever making that statement in your presence? A. No.

Q. You don't recall her making that statement at any time, is that correct? A. Yes.

Q. Now, after you received this home permanent, the first time you saw a doctor was Dr. Martin, is that correct, on February 28, 1955? A. Yes.

Q. And that was Dr. Martin in Kensal, North Dakota? A. Yes, sir.

Q. And he is your local doctor?

A. Yes, sir.

Q. Now, he examined your hair at that time, Sandra? A. Yes, he looked at it.

(Testimony of Sandra Mae Nihill.)

Q. Then he prescribed selsum. Do you recall that? A. Well he gave me something.

Q. Did he give you something or did he write you a prescription?

A. I think he gave us a prescription. [197]

Q. And did you fill that prescription?

A. Yes, sir.

Q. Whereabouts?

A. It would be our local drug store.

Q. And did you use the selsum on your hair?

A. Yes, sir.

The Court; What is that word, Mr. Packard?

Mr. Packard: (Spelling) S-e-l-s-u-m, I believe it's spelled. Selsum.

Mr. Lanier: (Spelling) S-e-l-s-a-m, your Honor.

The Court: (Spelling) S-e-l-s-a-m?

Mr. Lanier: Yes, your Honor.

The Court: Thank you.

Q. (By Mr. Packard, resuming): Now, when did you first use this selsum solution?

A. Right after he told us.

Q. Beg pardon?

A. Right after we got it.

Q. Well I mean did you use it the next week or two weeks [198] later, a month later—when did you use it?

A. It ought to be the same day I suppose.

Q. Used it the same day? A. Yes, sir.

Q. Will you please explain to the jury just how you used the solution?

A. I couldn't tell you.

(Testimony of Sandra Mae Nihill.)

Q. You don't recall how you used the solution the doctor gave you—and this was the time when your hair was all falling out and the first treatment you received, isn't that correct?

A. The directions were on the bottle.

Q. Well, I know, but you don't recall what you did, so far as the use of this selsum? A. No.

Q. It's your testimony though that you used it the first day? A. Well, I believe——

Q. Did you put it in your hair? A. Yes.

Q. And did you wash your hair first?

A. I couldn't tell you.

Q. Then, did you use it at any time after the first day? A. Well, yes.

Q. And when was the next time you used it after the first day you saw Dr. Martin? [199]

A. Well, I don't remember.

Q. Did you use it at any time after the first day you saw Dr. Martin, after the cold wave on February 5, 1955? What I'm getting at—strike that question—did you use it at any time after February 28, 1955? A. Well, yes.

Q. But you don't recall when?

A. Well, we used it right after Doc Martin gave it to us.

The Court: Pardon me. Was the 28th the day she made——

Mr. Packard: She saw Dr. Martin on the 28th, he was the first doctor she saw after this cold wave —that is correct, isn't it Sandra? A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. And on that date you used some of this selsum on your hair? A. Yes.

Q. Now, what I want to know is when did you use it again?

A. Well, I couldn't tell you.

Q. You haven't any idea? A. No, sir.

Q. Did you use it at any particular intervals, or any particular time? [200]

A. I believe that you weren't supposed to use it too close.

Q. But you don't recall? A. No, sir.

Q. When did you stop using it?

A. Well, after my hair was gone.

Q. And when was that? A. By June.

Q. 1955? A. Yes.

Q. Now, since that date, have you used anything on your hair?

A. Well, just—the doctor said use a little oil.

Q. A little baby oil or something like that?

A. No, well when it was dry the doctor said use a little oil.

Q. Well what type of oil did you use?

A. Well some Wild Root.

Q. Wild Root hair oil? A. Yes.

Q. And wasn't he the doctor that prescribed wild root hair oil to you?

A. He didn't prescribe it. He said that it would be all right to use it if it's dry.

Q. And your hair was dry at that time, is that correct? [201] A. That was after——

Q. After what?

(Testimony of Sandra Mae Nihill.)

A. Well my scalp was dry after all the hair fell out.

Q. And when did you first notice that your scalp was dry? A. Well, it——

Q. You don't know?

A. I don't know, I couldn't tell you.

Q. But you do know that your scalp was dry around in June, July and August of 1955?

A. It was dry before that too.

Q. Did you put anything on your hair when you noticed your scalp was dry? A. No.

Q. Well, you observed that your hair was continuing to fall out after you saw Dr. Martin on February 28, 1955, is that correct?

A. Yes, sir.

Q. Then, did you see any doctor after February 28, 1955, until you saw Dr. Martin again on July 6, 1955? A. No.

Q. Did you seek or obtain any treatment insofar as your hair or your head condition was concerned, from the time you saw Dr. Martin on February 28, 1955, until [202] July 6, 1955?

A. Well, we put that liquid he gave us on it, that selsum.

Q. But you didn't go back to him?

A. No, sir.

Q. Then your testimony is the only treatment is you continued to use the selsum from February 28, 1955, to July 6, 1955. Is that a correct statement, Sandra? A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. Then, after you saw Dr. Martin on July 28, 1955, he conducted a further examination——

Mr. Lanier: Incorrect statement, counsel.

Q. July 6, 1955. He examined your hair again and referred you to Dr. Melton in Fargo, North Dakota. Is that correct? A. I believe.

Q. And when did you see Dr. Melton in Fargo, North Dakota? A. I don't recall the date.

Q. Do you recall the date counsel?

Mr. Lanier: I can give it to you, counsel. August 9, 1955.

The Court: What's the name of the doctor?

Mr. Packard: Melton.: (Spelling) M-e-l-t-o-n, I believe. Is that correct, counsel?

Mr. Lanier: That's correct.

Q. (By Mr. Packard, resuming): Now, between July 6, 1955, and August 9, 1955, did you use any type of medication or receive any type of treatment to your hair? A. No.

Q. Did Dr. Martin, when you saw him on July 6, 1955, give you any further prescriptions, or prescribe any type of treatment to you? A. No.

Q. He just merely referred you to another doctor? A. Yes, sir.

Q. Then, how many times all together did you see Dr. Melton in Fargo, North Dakota?

A. I couldn't tell you.

Q. Well, do you recall whether you saw him two or three times, twenty times, a hundred times? Your best recollection, Sandra?

A. About four times I imagine.

(Testimony of Sandra Mae Nihill.)

Q. About four times. When was the last time that you saw Dr. Melton for any type of examination or treatment? A. I don't recall. [204]

Q. Well was it before Christmas 1955, or before the next basketball tournament in 1956, can you use that to—— A. Dr. Melton?

Q. Melton in Fargo?

A. Well the last time I can recall seeing him it was in the Spring of the year, I can remember that.

Q. Now——

The Court: Can you hear that, Mr. Packard?

Mr. Packard: She said the Spring of some year, I didn't quite——

Q. (By Mr. Packard, resuming): How far is Fargo from Kensal?

A. A hundred and ninety miles.

Q. A hundred and nine miles? A. Ninety.

Q. Ninety. Now did you receive any prescriptions or any treatment from Dr. Melton the first time you saw him on August 9, 1955?

A. I can't recall. I don't believe so.

Q. Do you recall the next time you saw Dr. Melton after August 9, 1955?

A. No, I don't recall.

Q. Do you recall any prescriptions or any treatment he gave you at any time while you were seeing Dr. Melton? [205]

A. Well, I believe he gave me some pills once.

Q. Do you know what type of pills he gave you? A. No.

(Testimony of Sandra Mae Nihill.)

Q. Did he give you anything to put on your hair? A. I can't recall.

The Court: Keep your voice up, Sandra.

Mr. Packard: Your Honor, maybe this would be a good time to adjourn for lunch.

The Court: Very well. Court will stand in recess—don't move yet—until two o'clock. The jury may withdraw, of course, under the same injunction as heretofore, you are not to talk to anybody or let anybody talk to you. Court will stand in recess until two o'clock.

(Whereupon, at 12:05 P.M., the hearing was adjourned until 2:00 o'clock P.M.) [206]

Afternoon Session

Whereupon, at the hour of 2:05 o'clock p.m., the hearing in the within cause was resumed pursuant to the noon recess heretofore taken, and the following further proceedings were had in open court:)

The Court: The witness may resume the witness stand.

Thereupon,

SANDRA MAE NIHILL

resumed the witness stand for further cross examination, as follows:

Mr. Packard: I don't have any further questions at this time, your Honor.

The Court: All right. Do you have any questions?

(Testimony of Sandra Mae Nihill.)

Mr. Bradish: Yes, a few your Honor.

Cross Examination

Q. (By Mr. Bradish): Miss Nihill, on the day that you went into this drug store in Kensal, North Dakota, did you go in for the specific purpose of buying a cold wave solution to do your hair? [207]

A. Yes.

Q. Do you know who the owner of that drug store is? A. I believe it's Herman Olig.

Q. It is who, ma'am?

A. I believe Mr. Herman Olig.

Q. I can't hear you, you better talk up a little?

A. Mr. Olig.

Q. How do you spell it please?

A. (Spelling) O-l-i-g.

Q. Herman Olig? A. Yes, sir.

Q. And is that the only drug store in the town?

A. Yes.

Q. And isn't that drug store, doesn't it have a sign out in front that says "Olig's Rexall Drug Store"? A. I don't recall.

Q. All right. Now, before going into this drug store on that particular day, you had on previous occasions, used some different types of cold wave solution on your hair, hadn't you?

A. Probably have.

Q. Do you know how many times before you went into the drug store to get the Cara Nome that you had purchased different types of cold wave solution for your hair? A. No, sir. [208]

(Testimony of Sandra Mae Nihill.)

Q. Well, was it more than once?

A. Well I believe so, I don't know if they were all cold waves or if I got them in the beauty shop.

Q. Well, maybe you can tell me this, before February 5, 1955, how many times had you had a cold wave treatment to your hair at home?

A. Only that one other time I can recall.

Q. Just the one other time? A. Yes, sir.

Q. And that was when you were in the seventh grade and just before this picture was taken, is that right? A. Yes.

Q. And that was sometime in 1954?

A. Yes.

Q. Can you tell me approximately the month in 1954? A. No, sir.

Q. Well was it more than six months before February of 1955? A. Oh, yes.

Q. More than six months? And on that particular occasion, you had used a Toni home wave kit, hadn't you? A. Yes.

Q. And when you used the Toni kit was it satisfactory, did you get a nice wave in your hair?

A. Yes, sir. [209]

Q. There was nothing, so far as you knew, that was wrong with the Toni kit, was there?

A. No.

Q. How long did the wave last that you got with the Toni kit? A. I couldn't tell you.

Q. Well in February of 1955, did you still have some wave in your hair or was it straight by that time? A. It was straight then.

(Testimony of Sandra Mae Nihill.)

Q. Now, when you went in to—was this Olig's drug store? A. Yes.

Q. Olig's Drug Store—you knew Mr. Olig, didn't you? A. Yes, sir.

Q. You bought things there before on several occasions, haven't you? A. Yes, sir.

Q. When you went in to Mr. Olig's drug store, did you go there for the specific purpose of buying a Cara Nome wave set?

A. Well we went to get a permanent of some kind.

Q. You went to get some kind of a cold wave set to do your hair at home, didn't you?

A. Yes, sir.

Q. And when you went there, did you talk to Mr. Olig about what particular kind of wave set that you should get? [210]

A. No, mom and I just talked it over.

Q. You and your mother talked, did you?

A. Yes.

Q. Now, when you went in to Olig's drug store on that date, did he have more than one kind of cold wave set for you to look at? A. Yes.

Q. He had several, didn't he? A. Yes.

Q. Do you know what different types you saw there? A. I couldn't tell you.

Q. Can you tell me how many different types, approximately, that you saw there that day and that you considered before you bought the Cara Nome set?

(Testimony of Sandra Mae Nihill.)

A. No, sir, I couldn't tell you, there were several of them there.

Q. Well, as many as five maybe? A. Yes.

Q. Do you remember the names of any of the other cold wave solutions which you considered?

A. No, sir.

Q. And when you went in to Mr. Olig's drug store on this date—by the way was this the same day that you used the Cara Nome set at home?

A. Yes, sir. [211]

Q. You bought it the same day, didn't you?

A. Yes, sir.

Q. That was February 5, 1955? A. Yes, sir.

Q. All right. Now, when you went in there on that particular day, February 5, 1955, had you ever heard of the Cara Nome wave before?

A. Well mom said it was okay.

Q. Your mother said it was okay?

A. Yes, she said she heard of it before.

Q. She heard of it before. Had you ever heard of it before? A. Well, I can't recall.

Q. You can't recall.

A. If I ever have, I don't remember.

Q. Isn't it true, Miss Nihill, that on that day that you went in to Olig's Drug Store, you first learned that there was such a wave preparation known as Cara Nome. Isn't that true?

A. I couldn't tell you for sure; I might have heard of it before, but I couldn't remember.

Q. Well if you heard of it before you don't remember it, do you? A. No.

(Testimony of Sandra Mae Nihill.)

Q. You don't remember ever having read about it in a newspaper or magazine article before February 5, 1955, do you? [212] A. Who, myself?

Q. Yes, ma'am.

A. I can't remember exactly.

Q. All right. And how long was it that you spent there in Olig's Drug Store before you finally decided to buy the Cara Nome wave set?

A. I couldn't tell you that either.

Q. All right. But at any rate you spent some time and you discussed the different types of wave set and your mother finally decided on this Cara Nome Set? A. Yes.

Q. To your knowledge, had anybody in your family ever used this Cara Nome wave set before that day? A. Not to my knowledge, no.

Q. All right. Now, sometime thereafter, you became aware of the fact that there was some sort of a guarantee—— (Addressing the Clerk) May I have the exhibits, the larger of the guarantees.

May I approach the witness, your Honor?

The Court: You may.

Q. This Exhibit 7, that you have identified, you say you got that in the drug store on the day that you bought this Cara Nome? A. Yes.

Q. Yes. Do you recall today that you got this particular guarantee on the day that you bought this wave set?

A. Well, there was a guarantee with it.

Q. Well, do you recall that there was a guarantee with it, ma'am, on the day that you bought it?

(Testimony of Sandra Mae Nihill.)

A. Well, the box——

Q. Do you recall receiving this guarantee here, which is Plaintiff's Exhibit No. 7, do you recall receiving this, or getting this, in Olig's Drug Store on the day that you bought the Cara Nome wave set? A. I don't remember——

Q. You don't remember getting this, do you?

A. No, not myself.

Q. When is it that you first remember having seen this particular guarantee which is Plaintiff's Exhibit No. 7?

A. Well when we went in to get the permanent, that was there, it was on display with the box.

Q. This particular guarantee that I have here in my hand which is Plaintiff's Exhibit No. 7?

A. Yes, sir.

Q. Do you remember distinctly that that was there on the day that you bought this wave set, is that right? A. Yes. [214]

Q. And do you recall picking it up and taking it with you when you bought the wave set?

A. I don't remember picking it up and taking it with me, but I remember seeing it there.

Q. You remember seeing it there?

A. Yes, sir.

Q. Well, insofar as this particular document here—this piece of paper that's Plaintiff's Exhibit No. 7, this physical thing that I hold in my hand, when is the first time that you recall having seen or touched this document?

A. Well that day in the store.

(Testimony of Sandra Mae Nihill.)

Q. Well do you recall having picked this up in the store and taking it with you?

A. Well myself, no, I didn't pick it up.

Q. You didn't pick it up?

A. I read it though.

Q. You read it in the store? A. Umhum.

Q. But sometime after February 5, 1955, you are aware of the fact that you saw this document that I have in my hand, aren't you? A. After?

Q. Well let me change the question. You told us Miss Nihill that you saw a document similar to this in the store on February 5, 1955. Is that correct? [215] A. Yes.

Q. Did you ever see this document again until you came into Court here yesterday?

A. Well, yes.

Q. Where did you see it the second time?

A. Well mother had it.

Q. She had it at home? A. Yes, sir.

Q. Well how long after you received this cold wave application to your hair was it that you saw this document the second time?

A. I couldn't answer because I don't know.

Q. Was it a year later?

A. I don't know.

Q. Could it have been maybe two years later?

A. I don't know.

Q. Where was it when you saw it for the second time?

A. Well it would be at home, you know.

Q. Do you recall it being at home, ma'am?

(Testimony of Sandra Mae Nihill.)

A. The last time I seen it mother had it.

Q. Well the last time you saw it your mother had it, let's get to that then. The last time you saw it, when your mother had it, where did you see it? A. I don't know.

Q. Well, was it in your home? [216]

A. Well, really, at the store is the last time I remember seeing it at all except when she had it there.

Mr. Bradish: May I have that answer, I didn't hear it. I hope you did, Miss Reporter.

(The reporter read the pending answer, as follows: "Well, really, at the store is the last time I remember seeing it at all, except when she had it there.")

Q. Is that correct, Miss Nihill?

A. Well mother had it there, and she said she was going to take it with her.

Q. Well, let me see if I get it straight then, on February 5, 1955, you were in the store with your mother and you saw this document in the store——

A. Yes.

Q. And you read it there? A. Yes.

Q. And so far as you know, of your own knowledge, that's the last time you ever saw this document until you came to Court here yesterday. Isn't that correct?

A. Well mother had it after that.

Q. I'm asking, Miss Nihill, if it isn't true that the last time you saw this document before you

(Testimony of Sandra Mae Nihill.)

came here to Court yesterday, was when it was in Olig's [217] Store on February 5, 1955? Isn't that right? A. The last time I seen it.

Q. Yes, ma'am?

A. Well mother seen it afterwards.

Q. Well I'm talking not what your mother saw because I assume that she will testify and we can talk to her later, but I only want to know what you recall? A. That's all I can recall.

Q. The last you recall you saw this document in Olig's Store on February 5, 1955, right?

A. Yes.

Q. All right. Now, this document here, which is Plaintiff's Exhibit No. 28, when did you first see that document?

A. This was inside the box.

Q. Well when did you first see it?

A. When we opened the box at the store and look at the contents, it was in there, and then at home.

Q. Did you see this particular document when you opened the box at the store? A. Yes.

Q. Well you did open the box at the store then, didn't you?

A. We opened it to see how many bobby pins were in there.

Q. You opened it to see how many bobby pins were in [218] there? A. Sure.

Q. All right. When you opened it to see how

(Testimony of Sandra Mae Nihill.)

many bobby pins were in it, did you see anything else in it?

A. Well, I couldn't tell you what was all in there.

Q. Pardon me?

A. I couldn't tell you what was all in it.

Q. You couldn't tell me what was in it?

A. No.

Q. You know that this was in it though?

A. Yes, we looked at the papers that was in it.

Q. You looked at the paper?

A. Yes, the directions.

Q. Do you recall, Miss Nihill, specifically seeing this little green piece of paper here, which is Plaintiff's Exhibit No. 28—do you distinctly recall at this time having seen this document in the box which you opened in Olig's Drug Store on February 5, 1955? A. Yes.

Q. You do. Did you read it at that time?

A. Yes, because—that's all.

Q. All right. You read it did you?

A. Yes.

Q. You were going to say "because" something, do you want to say anything more?

A. Because it was the same as the larger piece of paper. [219]

Q. It was the same as the larger piece of paper?

A. Well it was similar because they were both guarantees.

Q. They were both guarantees. And you read

(Testimony of Sandra Mae Nihill.)

and understood what that guarantee said, didn't you? A. Yes.

Q. You understood that that guarantee said that if the Cara Nome wave set wasn't better than any other that you used, you could bring it back and get double the purchase price that you paid for the set. Didn't you understand that?

A. Yes.

Q. Did you ever, ma'am, after you bought this set and applied the solution to your hair, did you ever go back to Olig's Drug Store and ask for double your money back with this guarantee?

A. I never.

Q. Now, I believe you testified that the instructions that were in this particular kit were read by all three of you ladies, your mother, Mrs. Briss, and yourself. Is that right? A. Yes, sir.

Q. And were they read before anything was done toward applying this cold wave to your hair?

A. Yes.

Q. And then I believe you also said that they were read aloud? [220] A. Yes.

Q. Who read them aloud? A. Mrs. Briss.

Q. Did she read them aloud to you and your mother? A. Yes.

Q. And did you read them yourself after you heard them read aloud? A. Yes.

Q. And you recall and understood what was contained in the directions, didn't you?

A. Yes, sir.

Q. Now, do I understand correctly that you

(Testimony of Sandra Mae Nihill.)

have no recollection at this time whether or not the pins were put in your hair before the solution was applied or after?

A. I couldn't tell you if they were or not.

Q. You do recall that your hair was shampooed before any of this Cara Nome solution was applied, don't you? A. Yes, sir.

Q. And how long was it before the Cara Nome solution was used that your hair was shampooed?

A. I think I shampooed it right before.

Q. Well in period of time, was it an hour or two hours or what?

A. Well, I couldn't tell you the exact time. [221]

Q. Can you give me any approximation?

A. About two hours or so.

Q. All right, and did you shampoo your hair yourself? A. Yes.

Q. And I believe you testified that you don't know what type of soap you used but it came out of a bottle? A. Yes.

Q. But you don't know the name of the soap. Is that right? A. I can't recall it.

Q. Do you know whether or not you had used that soap before on any occasion?

A. Probably had.

Q. Well do you know, ma'am, whether you used that particular type of soap at any time before this date? A. I couldn't tell you for sure.

Q. All right, thank you. And, insofar as the actual application of this solution to your hair is concerned, can you tell me the first thing that was

(Testimony of Sandra Mae Nihill.)

done to you, either by yourself, Mrs. Briss or your mother, after your hair was shampooed, in connection with this cold wave—what was the first thing that you recall that was done to your hair?

A. I couldn't tell you.

Q. You don't know? [222]

A. I can't recall it now.

Q. All right. Can you recall, from your reading the instructions or having the instructions read aloud to you, what was the first thing called for in the instructions to be done to your hair in the application of this solution?

A. No, sir, I can't recall.

Q. You don't know, do you? A. No, sir.

Q. And I believe you said, Miss Nihill, that at the time that this solution was poured over your head, you had a towel up over your eyes?

A. Yes.

Q. And you don't know whether that solution came out of the bottle or out of some other type of container, do you?

A. I assume it came out of the bottle.

Q. You assume it came out of the bottle?

A. That's the only other solution we had.

Q. Do you recall, ma'am, that in this Cara Nome set whether or not there was one or two or three types of solution to be used?

A. I couldn't tell you that.

Q. You don't know? A. No, sir. [223]

Q. As far as you can recall, there was only one solution used on your hair and that was what was

(Testimony of Sandra Mae Nihill.)

poured on your hair when you had the towels over your eyes, isn't that right?

A. Well, I don't know. I——

Q. As far as you can recall?

A. Well as far as I can recall.

Q. And when this solution was poured over your hair, and you had the towel over your eyes, as I recall your testimony, you are not sure whether or not you had the curlers or the pins, or whatever you ladies call these things, in your hair. Is that right? A. Yes.

Q. You don't know whether they were in or not? A. No, no then, I can't recall.

Q. What time of the day was it, please, that, approximately, that this treatment was given to your hair?

A. Well it was after supper some time.

Q. After supper, in the evening?

A. Yes, sir.

Q. And you've told us that you went to bed with these curlers in your hair. Is that right?

A. Yes.

Q. Well how long were you up after this process had been completed, before you went to bed?

A. I couldn't tell you that, I don't remember now. [224]

Q. A couple of hours? A. I don't remember.

Q. All right. You didn't notice any burning sensation to your scalp throughout the entire application of this treatment, did you? A. No.

(Testimony of Sandra Mae Nihill.)

Q. You noticed, when the bottle was opened, that it smelled a little bit funny? A. Yes.

Q. When you opened the bottle of the Toni application, did you notice that that smelled a little funny also? A. I can't remember that.

Q. You can't remember that. And you recall that there was some confusion concerning the timing of this procedure, but you are not sure whether or not Mrs. Briss said that she started to rinse it out fifteen minutes early. Is that correct?

A. Well the confusion was that she started to rinse it out early and mother corrected her and said we had to wait two more minutes, and so then we waited.

Q. I see. Do you know whether or not Mrs. Briss was watching the clock?

A. Yes, she was watching.

Q. She was watching the clock along with your mother, [225] is that right? A. Yes, sir.

Q. And when she wanted to rinse it out, your mother told her that she had two minutes to go?

A. Yes.

Q. And Mrs. Briss and your mother and you had all read the instructions before you started, hadn't you? A. Yes.

Q. Now, how long was it after this cold wave on February 5, 1955, that you first noticed that your hair was coming out?

A. Well about a week afterwards.

Q. And under what circumstances did you notice that?

(Testimony of Sandra Mae Nihill.)

A. Well when you combed it or something it would come out in the comb.

Q. It would come out in your comb?

A. Yes.

Q. Well, was there a lot of it or a small amount, or what?

A. I wouldn't know what you meant by "amount".

Q. Pardon?

A. What do you mean by the amount?

Q. Can you describe how much of it was—was it a big handful of it or just a small amount of hair?

A. Well, just when you put the comb through there would be some in the comb. [226]

Q. All right. Now, from the time that you got this cold wave until you first went to Dr. Martin on February 28, had you noticed any itching sensation or any irritation feeling whatsoever in your scalp or your eyebrows or your eye lashes?

A. I don't recall that.

Q. You don't recall any, do you. And, as far as you know, Miss Nihill, none of this solution which was poured out of the bottle over your head, none of that got into your eye lashes or your eyebrows, did it?

A. I couldn't tell you that.

Q. You don't know?

A. I couldn't tell you.

Q. At any rate, at that particular time, when

(Testimony of Sandra Mae Nihill.)

you had the towel over your eyes, did you have any burning sensation in your eyes at all?

A. Well, that's how come I kept the towel up there, to keep it from getting into my eyes.

Q. Well, all right. You kept the towel there to keep it from getting in your eyes. When you had the towel there, did you have any burning sensation or watering of your eyes at all?

A. Not that I can remember.

Q. All right. Now you have mentioned that—I believe—that as your hair started to come out, also all of [227] your eyebrows came out completely. Is that right? A. Yes.

Q. You had no eyebrows at all then as of June of 1955? A. I can't remember.

Q. Well did they seem to come out about the same time that your hair came out? A. Yes.

Q. And I believe you also testified that your eye lashes became very thin and sparse? A. Yes.

Q. And you only had a few of those left after June of 1955, is that right? A. Yes.

Q. Then you went to Dr. Martin on February 28, 1955, and he prescribed this medicine which has been indicated as being selsum, which you used on your hair. That's correct? A. Yes, sir.

Q. You are not sure how it was applied. Answer me this, if you can Miss Nihill, was it a cream or was it a paste or was it a liquid, what was the nature of this medicine that Dr. Martin prescribed for you to use? A. I couldn't tell you now.

(Testimony of Sandra Mae Nihill.)

Q. Did you apply it to your hair yourself at any time? A. No.

Q. Who applied it to your hair? [228]

A. My oldest sister applied it.

Q. Your oldest sister. A. Yes.

Q. And did this prescription that Dr. Martin gave you have any directions on it as to how this medicine was to be used? A. Yes, it did.

Q. Did you read the directions? A. Yes.

Q. What did they say as to how it was to be used?

A. Well, I couldn't tell you the exact directions.

Q. Well, can you tell me this, please, were you supposed to put this medicine in a bowl of water and bathe your head with it, or did you rub it into your hair, or into your scalp or in some manner can you tell me how it was used?

A. I think you just took it from the bottle and put it on your scalp, some way, but other than that I can't remember.

Q. You can't remember how your sister did it?

A. No, I can't remember.

Q. Can you remember from February 28, 1955, until July 6, 1955, can you remember how many times this selsum was applied to your head?

A. No, I can't remember. [229]

Q. Was it as many as five times, or——

Mr. Lanier: Your Honor. I'm going to object now as being repetitious. There's nothing new being added. We have been over this entire testimony with Mr. Packard, and the mere fact that there's

(Testimony of Sandra Mae Nihill.)

two defendants doesn't change the fact that this whole thing is repetition.

Mr. Bradish: Well, if I may be heard——

The Court: What did you say?

Mr. Bradish: If I may be heard, I'd like to say a few words. As I understand it, this is cross-examination, and I feel that I'm entitled to go into it rather completely since there has been a somewhat substantial claim made against my client in this matter.

The Court: I think you're entitled to go into your cross-examination with some degree of fullness. I think there is the usual, accepted, procedure whereby when two defendants have the same nature of case, involving the same type of facts, they should try to avoid making the cross-examination repetitive. I wish you would avoid that as much as you can. [230]

Mr. Bradish: I'll make every effort to do so, your Honor.

Q. (By Mr. Bradish, resuming): Isn't it a fact, Miss Nihill, that Dr. Martin is also somewhat connected with the School Board, where you attend school? A. I believe now he is.

Q. Was he at that time?

A. I couldn't tell you that.

Q. And during that period of time, between your first visit in February, and your second visit in June, did you ever have occasion to see Dr. Martin, either socially or otherwise, in your town?

(Testimony of Sandra Mae Nihill.)

A. Well, I suppose I see him on the street, going to and from school.

Q. Did you ever at that time discuss the condition of your hair with him? A. No.

Q. And on your second visit to Dr. Martin, he didn't make any prescription to you, he just told you to go see Dr. Melton? A. Yes.

Q. And you saw Dr. Melton, I believe, approximately four times? A. Approximately, yes.

Q. And he prescribed pills for you, didn't he?

A. Umhum. [231]

Q. When was the last time, Miss Nihill, that you have seen—I'm excluding now Dr. Levitt that you saw the other day, and Dr. Starr, that you saw at the request of Mr. Packard—excluding Dr. Levitt and Dr. Starr, when is the last time that you have seen any doctor for either treatment or examination of your hair condition?

A. Well, we had a basketball tournament——

Q. Did Dr. Martin examine your hair at that time? A. No, sir, not at that time.

Q. All right. And that was in February of this year, '58, wasn't it? A. Approximately.

Q. And then you had an examination by Dr. Martin for the same purpose in approximately February of 1957, didn't you? A. Oh, yes.

Q. All right. Between those two dates, February of '57 and the present time, other than Dr. Levitt and Dr. Starr, which you saw here in Los Angeles, have you seen any doctor for either examination or treatment of your hair?

(Testimony of Sandra Mae Nihill.)

A. I don't remember.

Q. Well, let me ask you this, since February 5, 1955, have you seen any doctor at all for examination or treatment, other than Dr. Martin or Dr. Melton? [232] A. I seen Dr. Michelson.

Q. You saw Dr. Michelson and he examined you at the request of Mr. Packard, did he not?

A. Yes.

Q. That was in Minnesota? A. Yes.

Q. All right. Excluding Dr. Michelson, for treatment or examination from the date of this cold wave in February of '55 up to the present time, have you seen any other doctors, except Dr. Melton or Dr. Martin, for treatment to your hair?

A. Well, Dr. Michelson.

Q. Did you see Dr. Michelson more than once?

A. I just think it was the one time.

Q. Just once. Excluding Dr. Michelson, any other doctors at all? A. I believe not.

Q. When you went in to Olig's Drug Store on this date, did you read the package that you bought, later? A. Oh, yes, we looked at it.

Q. You looked at the outside? A. Yes.

Q. Did you see anything written on the outside of the package that convinced you that that was the type that you should buy? [233]

A. Well on the outside of it was something about being quicker and safer or something.

Q. Quicker and safer?

A. Well, something——

(Testimony of Sandra Mae Nihill.)

Q. Do you recall seeing that on the outside of the package?

A. Well, somewhere—I remember those words.

Q. Well, did reading that, if you saw it on the outside of the package, in any way influence you to decide to buy that particular product, other than one of the others? A. No, sir, I——

Q. Didn't have anything to do with it, did it?

A. No, sir.

Mr. Bradish: That's all.

The Court: Any further direct, re-direct?

Mr. Lanier: One or two questions, your Honor.

Redirect Examination

Q. (By Mr. Lanier): Now, Sandra, there have been one or two questions asked you in relation to your being examined at the request of the defendant, by a Dr. Starr, here in [234] Los Angeles. That examination was made yesterday noon. Is that correct? A. Yes.

Q. Do you recall what time you went to Dr. Starr's office?

A. We left here about twelve-thirty or so, and we got there about one o'clock.

Q. Now, I'm not counting your waiting time in the office, Sandra, but the actual examining time of Dr. Starr, how long were you with Dr. Starr in the examination?

A. Well, approximately only about twenty minutes or so.

Q. With Dr. Starr himself? A. Yes.

(Testimony of Sandra Mae Nihill.)

Q. All right. You were also asked, Sandra, whether or not any one in your home, of your family, that you knew of, ever used Cara Nome before, and you stated "not to your knowledge". Is that correct? A. Yes.

Q. Has anyone ever used it since? A. No.

Mr. Packard: I object.

Mr. Lanier: That's all, your Honor. [235]

The Court: Well it may stand.

Recross Examination

Q. (By Mr. Packard): Sandra, in connection with the reading of these instructions, when were these instructions read during the time you were being given this cold wave? When I say that, were the instructions read before your shampoo or after your shampoo, or were they read before your hair was pinned up, after it was pinned up. Do you recall that?

Mr. Lanier: May it please the Court, objected to, it's beyond the scope of the re-direct examination.

The Court: Overruled.

A. Well we read it before and after, both.

Q. Now, you, I believe, stated in response to a question Mr. Bradish asked you—the gentleman over here—that the only solution you saw came out of a bottle. I believe that we have here a bottle which has been marked Plaintiff's No. 5. You have seen that bottle, is that correct? [236]

A. Yes.

(Testimony of Sandra Mae Nihill.)

Mr. Lanier: May the record show, your Honor, so that I won't be interrupting anymore, that I have a standing objection to every question asked which is beyond the scope of the redirect examination?

The Court: You may have your objection noted and have an exception to each ruling of the Court.

Q. (By Mr. Packard, resuming): Now, you observed that bottle I just showed you, Sandra, is that correct? A. Yes.

Q. Now, did you observe what was done with the bottle after you were given your cold wave?

A. You mean directly afterwards?

Q. Yes? A. No, I can't remember.

Q. When was the next time you saw that bottle?

A. Well, mother looked it up again after my hair started falling out.

Q. And when was it that your mother looked up the bottle after you had this difficulty with your hair? A. I couldn't tell you exactly.

Q. A week, two weeks, a month?

A. It was just a couple of weeks afterwards.

Q. A couple of weeks afterwards your mother looked around for the bottle? Is that correct?

A. That's as close as I can remember.

Mr. Packard: That's all the questions.

Mr. Bradish: Nothing further.

The Court: Stand aside.

(Witness excused.)

Mr. Lanier: At this time, may it please the Court, the plaintiff would call Mr. Grace Spedding.

The Court: Will that be a long witness?

Mr. Lanier: I believe not, your Honor. At least she won't be on my part.

The Court: Very well.

Thereupon,

GRACE SPEDDING

called as a witness on behalf of the plaintiff, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

The Clerk: What is your name?

The Witness: Grace Spedding.

The Clerk: Thank you.

Direct Examination

Q. (By Mr. Lanier): Your name is Mrs. Grace Spedding? A. Yes.

Q. And where do you live Mrs. Spedding?

A. I live in Woodland Hills.

Q. That is California? A. Yes.

Q. I presume everyone here knows those names, I don't. What is your business, Mrs. Spedding?

A. I'm in the hair business—wig maker.

Q. And do you have a business establishment?

A. Yes, I do.

Q. And where is that located?

A. We're at 6671 Sunset Boulevard, Hollywood.

Q. And, Mrs. Spedding, would you tell the jury how long you have been in the wig making and transformation making business?

A. Well I was employed by Max Factor for thirty years, and [239] I've been in business for myself about fifteen.

(Testimony of Grace Spedding.)

Q. So that you have been in that business exclusively for forty-five years? A. Yes.

Q. Thirty of it with Max Factor and fifteen with your own establishment? A. That's right.

Q. Is your establishment, as such, and in its field, Mrs. Spedding, is it a large establishment or a small establishment?

Mr. Bradish: Well, wait a minute. I object to that as calling for her conclusion. Every person who is in business thinks they have a large establishment——

The Court: Well maybe she doesn't; we'll find out.

A. Well I'm next in size to Max Factor.

Q. That is in Los Angeles? A. Yes.

Mr. Bradish: May the record show that I move to strike that as this lady's conclusion. We have no evidence here as to how large Max Factor is, and whether there is somebody larger; I don't think it's particularly material, but I would like the record to reflect that. [240]

The Court: Motion denied. Proceed.

Q. (Mr. Lanier, resuming): Mrs. Spedding, did you have occasion, Monday of this week, to examine and to measure and fit Sandra Nihill?

A. I did.

Q. And have you made those measurements and fittings? A. Yes, I have.

Q. For what purpose? A. To make a wig.

Q. Now, would you tell the jury, Mrs. Spedding, what the approximate cost of a wig for Sandra is?

(Testimony of Grace Spedding.)

A. Well, I priced it at $275.

Q. Now, Mrs. Spedding, so that the jury might know, is it possible, can you make, within your establishment, and your regular prices, can you make her a wig cheaper than that?

A. Yes, I can.

Q. About how cheap could it be made?

A. Well, I'd say around $200.

Q. That would be about the bottom?

A. Yes.

Q. Now, would you explain to the jury, Mrs. Spedding, the normal care of a wig?

A. Well, they have to come in for cleaning and dressing about every week and that is dipped in solvent, and [241] then it's put on blocks and stretched to the proper size of the head again, and water waved, pincurled and dried, then it's combed out and delivered to the customer again.

Q. You say that is about a weekly operation?

A. Yes.

Q. And what is the normal charge of that operation? A. Five dollars.

Q. Can this be done anywhere in the country, Mrs. Spedding?

A. Well it has to be done by someone that understands working with hair—artificial hair.

Q. Do you know of any such establishment in the State of North Dakota?

A. No, I do not.

Q. Do you know of any such establishment in the State of South Dakota?

(Testimony of Grace Spedding.)

A. No, I do not.

Q. Do you know of any such establishment in the State of Minnesota? A. No, I do not.

Q. With your customers, Mrs. Spedding, do you have any large number of "out-of-city", "out-of-State" customers? A. Yes, we do. [242]

Q. Are their transformations mailed back to you for such treatment as you have described?

A. Yes.

Q. Now, that brings us to the next point, Mrs. Spedding. Is it under proper care, is it possible to get by with one transformation?

A. No, you really need two. You must have two.

Q. You must have two? A. Yes.

Q. Do you recommend anymore?

A. Well, it's very convenient to have three, or more. I have some customers that have as many as ten.

Q. Will you explain to the jury why it is better to have three?

A. If you have three, and you have to ship them, you wear one and you generally have one in the mail and you have one in reserve. You always need one in reserve. If something happens to your hair piece, if you're caught out in the rain or if you are going somewhere and you need a new hair set, you can't rush to a beauty shop and get it, you have to have a fresh hair piece to put on.

Q. Then, if not three for convenience, two are necessary? A. Yes, absolutely.

Q. Now, Mrs. Spedding, would you tell the jury

(Testimony of Grace Spedding.)

what the [243] normal life of one transformation, such as you have described, and at such cost as you have described, would you tell them what the life of a transformation is?

A. Well, of course, that depends on the care that you give it, but approximately eight months or a year.

Q. Presuming good care? A. Yes.

Q. Then you would state eight months to a year? A. Yes.

Q. And at that time the transformation then must be replaced? A. That's true.

Q. New wigs made? A. That's right.

Q. And when the new wigs are made, are they at the same cost approximately, as you have already given me? A. Yes.

Mr. Lanier: Your witness.

Mr. Packard: I have no questions.

Cross Examination

Q. (By Mr. Bradish): Mrs. Spedding, did you make this transformation that this lady is wearing now? A. No, I did not. [244]

Q. And you have taken an order, I suppose, to make up one for her? A. Yes.

Q. In your business, Mrs. Spedding, you are not concerned with determining whether or not your customers will ever get their hair back, are you?

A. Well I'm sure if I could make hair grow, I'd be very happy to do that.

(Testimony of Grace Spedding.)

Q. Yes, ma'am, but when you took somebody for one of these transformations, you don't determine whether or not the doctor has indicated that they can't have any more hair, do you?

A. No, I don't.

Q. In other words, you fit a transformation to a head, and as long as the customer comes to you for new ones, you send them some new ones, don't you? A. Oh, naturally, we're in business.

Q. That's your business, isn't it? A. Yes.

Mr. Bradish: That's all.

Mr. Lanier: No further questions, Mrs. Spedding. Thank you very kindly.

(Witness excused.) [245]

The Court: I think we'll be in recess for ten minutes. Try to get back to the jury box in ten minutes please.

(Thereupon, a ten minute recess was taken, and thereafter the following proceedings were had in open court:)

The Court: Proceed.

Mr. Lanier: I wonder if the Clerk would get me the deposition of Mr. Charles A. Schmid.

Mr. Packard: Charles who?

Mr. Lanier: Schmid.

Mr. Packard: I never heard of him.

Mr. Lanier: You were represented at the deposition, counsel. If you will look at the end of your Dr. Melton deposition I think you will find it.

(The Clerk furnished the deposition of Mr. Charles A. Schmid.)

Mr. Lanier: We have plenty of copies of this, your Honor, so if the Court would want to follow. Could I get permission [246] of the Court, your Honor, to have associate counsel take the witness stand and answer the questions?

The Court: Very well.

Thereupon,

DEPOSITION OF CHARLES A. SCHMID

witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows:

Mr. Lanier: So that the jury might know, I am going to read the questions as the interrogator and Mr. Rourke will answer as the witness who gave this deposition.

May we dispense with the stipulations at the start of it, counsel?

Mr. Packard): Yes. I'll stipulate insofar as all the depositions are concerned counsel, that the proper formalities have been met, proper foundations, and so forth on all the depositions.

Mr. Lanier: It is so stipulated.

The Court: Let the record so show.

Mr. Lanier: Charles A. Schmid, being first duly sworn to testify [247] the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Q. (By Mr. Lanier): Would you state your name? A. Charles A. Schmid.

Q. Where do you live?

A. 318 23rd Avenue North, Fargo.

(Deposition of Charles A. Schmid.)

Q. What is your occupation?

A. I am a photographer.

Q. How long have you been in the photography business? A. About eight years.

Q. How long have you been in that business in Fargo? A. About four and a half years.

Q. Were you in that business in Fargo in about January of 1955? A. I was.

Q. Did you or not have occasion on or about January 20th of 1955, of taking some pictures of a girl named Sandra Mae Nihill of Kensal, North Dakota? A. Yes.

Mr. Packard: Counsel, if I may interrupt you just a moment. I will stipulate the reporter need not take down all the depositions unless something is objected to, or there is some objection raised.

Mr. Lanier: I will so stipulate, counsel.

Mr. Packard: They will be on file.

Q. (By Mr. Lanier, resuming): Was that picture taken as one of a particular group or class?

A. She was a student at the Kensal High School and she was one of the students there.

Q. Your firm of photographers had contracted to take pictures of that particular high school group? A. That is right.

Q. Mr. Schmid, I show you Plaintiff's Exhibit C. Would you tell me whether or not if that is a finished picture of Sandra Mae Nihill which you took on or about January 20, 1955?

A. Yes, it is the original print, one of the original prints.

(Deposition of Charles A. Schmid.)

Q. Do you still have in your possession the negative of that print? A. That I don't know.

(Plaintiff's Exhibit D marked—photograph.)

Q. Mr. Schmid, I show you plaintiff's Exhibit D. Would you tell me what that exhibit is?

A. It is an enlarged copy of Exhibit C.

Q. Did you and your firm make that enlargement? [249] A. I made it myself.

Mr. Lanier: At this time, may the record show that I offer into evidence Plaintiff's Exhibits C and D.

For the purpose of clarification, your Honor, I believe that they had best be remarked.

The Court: I think so, yes.

Mr. Lanier: In the order that the Clerk has the others.

The Clerk: Plaintiff's Exhibit No. 30 marked for identification. And Plaintiff's No. 31 marked for identification.

(Thereupon, the photographs previously marked Plaintiff's Exhibits C and D respectively, were remarked for identification by the Clerk, as Plaintiff's Exhibits 30 and 31 respectively.)

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibits 30 and 31.

The Court: Which one is 31?

Mr. Rourke: The enlargement.

The Court: The same as the small? [250]

Mr. Packard: No objection.

(Deposition of Charles A. Schmid.)

The Court: Admitted.

(Thereupon, Plaintiff's Exhibits Nos. 30 and 31, heretofore marked for identification, were received in evidence and made a part of this record.)

Mr. Lanier: That is true of both counsel?

Mr. Bradish: Yes.

Mr. Lanier: May I have permission to pass this photograph to the jury, your Honor?

The Court: You may.

(Thereupon, the photograph was passed to the jury for their examination.)

Q. (Mr. Lanier, resuming): Mr. Schmid, I show you plaintiff's exhibits A and B. Will you tell me whether or not you took those pictures?

A. I did.

Q. Will you tell me approximately upon what date you took those pictures?

A. May 26, 1956. [251]

Q. And appearing on the back of these exhibits A and B are certain seals, "From Scherling's, Inc." Is Scherling's, Inc., your company, the company that you work with?

A. Scherling's, Incorporated, yes.

Q. Is that your seal on the back?

A. That is our mailing label.

Q. Did you cause these labels to be placed on the back of the photographs?

A. I typed it up on the typewriter and I glued them on myself.

Mr. Lanier: I offer in evidence Plaintiff's Ex-

(Deposition of Charles A. Schmid.)

hibits A and B. And, likewise, your Honor, I believe we had best re-mark these to conform with the——

The Court: Very well. Re-mark them.

The Clerk: Plaintiff's Exhibit 32——

The Court: Have you gentlemen seen those?

Mr. Packard: Yes, I have copies, your Honor.

The Court: Any objection? [252]

Mr. Packard: No objection.

The Court: Mr. Bradish?

Mr. Bradish: No objection.

The Court: Admitted.

The Clerk: ——and 33 admitted in evidence.

The Court: Offered and admitted in evidence.

(Thereupon, Plaintiff's Exhibits previously marked A and B, were re-marked Plaintiff's Exhibits Nos. 32 and 33, received in evidence and made a part of this record.)

The Court: Pardon me. Did the witness state the date of this——

Mr. Packard: May 26, 1956.

(Thereupon, said Exhibits 32 and 33 were passed to the jury.)

Mr. Lanier: Does counsel care to read the cross?

Mr. Packard: I don't care to ask any questions on cross examination. We will waive the cross examination, your Honor. [253]

The Court: Cross examination waived.

Mr. Lanier: At this time, would the Clerk please get me the original deposition of Mrs. Adaline Jorgenson?

(The Clerk furnished said deposition to counsel.)

Mr. Lanier: In this case, your Honor, there are insufficient copies and the witness, I'm afraid, will have to read from the original.

The Court: What's the name of the witness?

Mr. Lanier: Mrs. Adaline (spelling) A-d-a-l-i-n-e Jorgenson. I might add here, your Honor, that Mrs. Jorgenson is the lady, throughout this trial, who has been referred to as Mrs. Briss.

Thereupon,

DEPOSITION OF MRS. ADALINE JORGENSON

was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows:

Mr. Lanier: Mrs. Adaline Jorgenson, a witness called at the request of the defendants, being first duly sworn to testify to the truth, the whole truth, so help her God, thereupon testified as follows:

Mr. Lanier: Now, counsel, I presume that you will possibly want [254] to read that yourself?

Mr. Packard: What are you talking about, counsel?

Mr. Lanier: This is cross examination.

Mr. Packard: No, you can go ahead and read that.

Mr. Lanier: All right (Reading:)

By Mr. Jungroth: (For the defendants)

Q. Would you state your name, please?

A. Mrs. Adaline Jorgenson.

Q. And Mrs. Jorgenson, I don't wish to pry into

(Deposition of Mrs. Adaline Jorgenson.)

your affairs, or anything, but you are the same person who gave a statement at 10:00 o'clock in the morning on February 23, 1956?

A. That's right.

Q. And I believe at that time you were Mrs. William Briss, is that true? A. Yes.

Q. Now, Mrs. Jorgenson, I understand that you were one of the persons who assisted in giving a home permanent to Sandra Mae Nihill sometime in February of 1953? A. I was. [255]

Q. Do you remember when that was?

A. February the 5th of 1955.

Q. And how do you remember the date so specifically?

A. Well, it was before the basketball tournament, the Saturday before the basketball tournaments started because she wanted her permanent for the basketball tournament.

Q. And who was present at the time that you——

A. Well, Mrs. Nihill, and all the other children at home, besides myself and my husband.

Q. Who were all the other children you mentioned?

A. Well, there was the boys, Pat and Tommy, and then my boys. It was in the evening.

Q. Who was actually in the room at the time you were giving the permanent?

A. Well, I believe it was the three of us, Mrs. Nihill, and I, and Sandra.

(Deposition of Mrs. Adaline Jorgenson.)

Q. And who was actually involved in the giving of the permanent?

A. I put the pin curls in.

Q. And you, of course, are not a licensed beauty operator? A. No.

Q. Or a hairdresser? A. No.

Q. Or a cosmotologist? A. No. [236]

Q. How did you go about putting the pin curls in?

A. Well, I had her shampoo her hair first, like in the directions, and then rolled it up in pin curls and poured the solution on.

Q. What kind of a permanent wave did you have? A. We had a Cara Nome.

Q. And were there instructions in the box?

A. Yes.

Q. Now, I believe that you stated that you had her shampoo her hair, let it partly dry, and put it in pin curls? A. Yes.

Q. What was the next step that you took?

A. Well, to put the solution on.

Q. How did you put the solution on?

A. With a piece of cotton.

Q. Where was the solution at the time?

A. It was in a glass dish on the table.

Q. Was the solution in the glass dish straight, I mean, did you just pour solution out of the bottle?

A. I was supposed to take half of it first and then cork the rest up, and after I got the pin curls up, put the rest of it on.

(Deposition of Mrs. Adaline Jorgenson.)

Q. Now let me get this. You put the hair up in pin curls first? [257]

A. I put, soaked it with the solution first, and then I put it in pin curls. After I had it all up in pin curls, then I put the rest of the solution on, what was left.

Q. How long did you leave it in after, let's see, the first time that you soaked it in the solution?

A. Before I neutralized it you mean?

Q. Yes.

A. Well, I don't remember just the exact time, but I went by the directions. We had read those over carefully first.

Q. Where was Sandra Nihill sitting at this time?

A. At a chair by the dining room table.

Q. Where was her mother?

A. Sitting right alongside the table.

Q. And where was the bowl that you mentioned?

A. On the table.

Q. And where was the permanent, the solution?

A. That was sitting in the bottle on the table, what I didn't have in the dish.

Q. Were you watching television or anything while you gave the permanent?

A. No, they didn't have television.

Q. Whose home were you in at that time?

A. Nihill's.

Q. And where was that? [258]

A. That was three miles and a half west of where I lived.

Q. And as you gave this permanent what did

(Deposition of Mrs. Adaline Jorgenson.)

you do when you finished then with it? You put the solution on, you rolled it up, you put more solution on. Then what did you do?

A. You are supposed to wait a certain length of time.

Q. And you waited that length of time, did you?

A. Yes.

Q. And then what did you do?

A. Then you are supposed to neutralize it. Well, I waited and when it was time to neutralize, I didn't remember the exact time to neutralize. Well, I started to neutralize a few minutes before I was supposed, and I happened to think about it and it was ahead of time. I didn't leave it too long; I started rinsing it out before the time was up.

Q. And you are sure that only one home permanent was used, there weren't parts of any two mixed?

A. Oh, no, the seal was never broken on that bottle until I broke it.

Q. And at the time are you sure that you didn't make any other mistakes in following the directions?

A. No, I always read them over carefully first.

Q. Now, I believe the directions state that the permanent is to be kept off the forehead, is that right? [259]

A. Yes, it is supposed to be.

Q. And what precautions did you take to see that it was kept off the forehead?

A. Well, whenever it dripped down we had her

(Deposition of Mrs. Adaline Jorgenson.)

take a towel and dry it. Naturally some is bound to drip down.

Q. You did have a towel on her forehead though when putting——

A. So if it started to run we would wipe it right off.

Q. And you kept it off of her eyebrows that way? A. Well, we tried to.

Q. Well, didn't you?

A. I don't know if some got down there or not.

Q. But you did follow the directions?

A. Yes, we did follow the directions.

Q. And what part did Mrs. Nihill take in the——

A. Well, she was helping us time the permanent.

Q. And by helping you time how did she go about it?

A. Well, she was watching the clock on the wall, but then she happened to be doing something there once when I thought the time was up, and it wasn't, when I started rinsing it out.

Q. And she wasn't watching the clock at that time? A. No.

Q. Now, did you keep a towel on her forehead all the [260] time you were soaking the solution into the hair? A. Yes.

Q. So that the towel on the forehead then would keep any of the solution from the forehead?

A. Well, it would keep the biggest part of it; some of it might have leaked down under, might have leaked. That was the general idea, to keep the

(Deposition of Mrs. Adaline Jorgenson.)
solution from getting in her eyebrows and in her eyes.

Q. Sandra Nihill never complained about any solution being in her eyes?

A. Well, not to my knowledge.

Q. She never mentioned it to you that you recall? A. No.

Q. And you did your best, then, to keep the solution from her forehead? A. Yes, I did.

Q. And you used a towel to soak it up with when you put the dobs on the hair?

A. To wipe it off her forehead if some did leak down there.

Q. How much of the solution was used then?

A. All of it.

Q. And then when the, you said the time was up, I believe, and you put the neutralizer on, then what did you do? [261]

A. Well, I told her to put a towel on her face and put her head under the faucet on the sink, and they had a spray on there, and I started spraying the solution out of her hair after the neutralizer was out of it.

Q. And how long did you do this?

A. Well, until I thought it was, the solution was out.

Q. And what did you do then?

A. Then we took and combed her hair out after it dried and put it up in pin curls again.

Q. Oh, the pin curls weren't left in all the time?

A. Just until her hair dried.

(Deposition of Mrs. Adaline Jorgenson.)

Q. And it dried that night, did it?

A. Yes, it was dried that night before she went to bed, and we reset it with just water.

Q. Did Mrs. Nihill take any part in putting the solution on the hair? A. No.

Q. Did Sandra take any part in putting it on the hair? A. No.

Q. And did anyone else take part in putting it on the hair besides yourself? A. No.

Q. And have you ever given home permanents before?

A. Oh, yes, I have given a lot of them.

Mr. Jungroth: I believe that is all. [262]

Redirect Examination

Q. (By Mr. Lanier): Counsel has referred to a previous statement taken by him, Mrs. Jorgenson, at a time when your name was Mrs. Briss?

A. Yes.

Q. And your name now is Mrs. Erickson?

A. Jorgenson.

Q. Jorgenson, excuse me. Would you tell me when Mr. Briss passed away?

A. November 7th, 1956.

Q. And you have since recently remarried?

A. Yes.

Q. To a Mr. Jorgenson? A. Yes.

Q. At Kensal, North Dakota? A. Yes.

Q. And did you live at Kensal, North Dakota prior to Mr. Briss'——

A. We lived on a farm northeast of Kensal.

(Deposition of Mrs. Adaline Jorgenson.)

Q. In other words, that has been your general community area for a long time?

A. For 17 years.

Q. And now you have also testified that you have given many home permanents? [263]

A. I have.

Q. That would cover, I presume, a variety of different brands of home permanents?

A. That's right.

Q. Do they or not all come with instructions for use? A. They do.

Q. Do those instructions sometimes vary from one to the other? A. Oh, yes.

Q. As a result, then, do you or not make it a habit to carefully read those instructions?

A. I do. I read every set of instructions with each permanent carefully.

Q. Do you or not follow the particular set of instructions given for each particular home wave?

A. I do.

Q. Did you do that in that particular case of the application of the Rexall Cara Nome?

A. Yes.

Q. Did you follow it carefully and meticulously?

A. Yes, I did.

Q. What particular reason is it that you have given a great number of these home waves?

Mr. Packard: I waive the objection. [264]

A. Well, I have a lot of friends and they want home permanents, and they knew I had been putting them in, so I do it for a favor for them.

(Deposition of Mrs. Adaline Jorgenson.)

Q. You have never done that on a charge basis?

A. Oh, no.

Q. How big is Kensal, by the way?

A. I haven't the slightest idea. It isn't very large.

Q. Can you give me a rough approximation?

A. About 350. I haven't the slightest idea.

Q. Would 350 people sound right to you?

A. Well, about that.

Q. And then there is also a rather populated farm area around Kensal? A. There is.

Q. And I presume that that is a town that is a rather close-knit, neighborly group?

A. They are.

Q. And it's among your friends and neighbors that you have given these permanents?

A. Yes.

Q. So that do you feel yourself qualified and very able by experience in giving these home waves?

Mr. Packard: I object. That calls for her conclusion. Self-serving. [265]

The Court: She may answer.

A. I figure if they want me to put them in, I will.

Q. Do you feel yourself qualified to?

A. Well, I think I am.

Q. All right. Now, Mrs. Jorgenson, in the application and use of these various home waves that you have given, have you ever had any result such as you saw in the use of this Rexall Cara Nome permanent? A. Never.

(Deposition of Mrs. Adaline Jorgenson.)

Q. In your experience in the giving of these various waves, have you ever had, aside from hair or scalp damage, have you ever had what you would call a poor result?

A. Well, there is some that doesn't turn out as good as the Toni. It all depends on the different kind of permanents too.

Q. Are you referring there to the type of the wave?

A. Yes. That has a lot to do with it.

Q. Have you ever seen any result in your own personal experience where the hair has been damaged?

A. No, I have never seen any damage done to hair before, except in this case.

Q. Have you ever, in your experience in giving the home [266] waves, seen any damage other than this case to the scalp or skin?

Mr. Packard: Just a moment. I object to that question on the ground that it calls for medical testimony, and calls for a conclusion of this witness, and is speculative. No proper foundation.

The Court: Read the question again, Mr. Lanier.

Mr. Lanier: That particular question, your Honor, was not answered in the deposition anyway, so it might just as well be withdrawn.

The Court: Withdrawn and the jury will disregard it.

Q. Now, from the time that you first opened the bottle of the solution of the Rexall Cara Nome product at the time you were giving the wave to

(Deposition of Mrs. Adaline Jorgenson.)

Sandra Nihill, did you notice anything unusual about the solution? A. Yes, I did.

Q. Would you state what that was?

A. It had an awfully strong odor.

Q. Was that odor visibly to you stronger than others? A. Oh, yes.

Q. Now, in the use of the solution, the permanent wave [267] solution, did you notice anything unusual about its sensation and feel upon your own hands? A. Yes, I did.

Q. And would you tell me what that was?

A. That it smarted my eyes, made my eyes burn, and it made my hands burn.

Q. Have you ever had that same sensation from any other permanent wave solution, home waves, that you have used?

A. No, I never had that same experience.

Q. Now you have testified, Mrs. Jorgenson, that you also used a towel? A. Yes.

Q. And had Sandra holding a towel. I believe you yourself never held or used the towel, did you?

A. No. Well, just when it started running down her face when I was putting the pin curl in.

Q. That towel was being held by Sandra?

A. Most of the time.

Q. Now, I believe that the directions with the box stated that you were to use one-half of the wave solution first being dobbed on each individual pin curl. Is that correct? A. That is correct.

Q. And after that you were to throw away the dish in [268] which you have put one-half of the

(Deposition of Mrs. Adaline Jorgenson.)

solution, that is, throw the solution out of the dish—— A. What you didn't use.

Q. And put in the other half remaining in the bottle in the dish, is that correct?

A. That's correct.

Q. And then I believe the directions went on further to state that you were to take that bowl again consisting of one-half of the bottle, and pour it all over the head, is that correct?

A. I believe that is right.

Q. Did you do that? A. Yes.

Q. And I believe the directions go further and state that you should use another bowl to catch the solution while you were pouring it, while it ran down the head, is that correct? A. I believe.

Q. And was that done? A. Yes.

Q. Now, regardless—scratch.

Where were you at the time you were pouring the solution over her head?

A. Over the kitchen sink. [269]

Q. Was she sitting in what position, with her head over the sink?

A. She was standing and bending with her head down in the sink.

Q. And that would be face down in the sink?

A. Yes.

Q. So that the solution went over her head and ran down the front part of her head, is that correct?

A. Yes.

Q. And this solution, of course, all didn't stay in the hair? A. No, it didn't.

(Deposition of Mrs. Adaline Jorgenson.)

Q. It had to run down. Now, she was sitting there with a towel, was she?

A. Yes, she had a towel.

Q. And would it be possible for that towel, for that solution to run over her head without running down her forehead?

Mr. Packard: Well I object. That calls for a conclusion. Speculation.

The Court: Sustained.

Q. Did the solution run down her forehead?

Mr. Packard: I move to strike the answer on the ground that it's not responsive. [270]

The Court: I don't know what the answer is.

Mr. Packard: Well, I believe the answer is not responsive. I can show you.

(Counsel shows the answer in the deposition to the Court.)

Mr. Lanier: I'm inclined to agree with counsel, your Honor, that it is not responsive.

The Court: Objection sustained.

Q. After you were through pouring the solution, was it or not necessary to take the towel and dab off the solution from her forehead and eyebrows?

A. Yes, it was.

Q. And you definitely did remove the solution from her forehead and eyebrows? A. Yes.

Q. So then that the solution in some form or another did get into the eyebrows? A. Yes.

Mr. Lanier: I wonder if you will please mark this Plaintiff's Exhibit "E." [271]

(Deposition of Mrs. Adaline Jorgenson.)

Mr. Lanier: And "FF" at that time was also marked.

Q. Now, Mrs. Jorgenson, I show you a piece of paper which has been marked as Plaintiff's Exhibit "E." I will ask you to look that over carefully and tell me whether or not that is substantially the same instructions that you read and followed in your application of the Cara Nome Home Permanent Wave?

Mr. Packard: Now, I object to the answer upon the ground that it calls for a conclusion on the part of this witness as to whether she followed the instructions. That's a question for the jury to determine. They have heard the testimony as to the procedure that was followed; they have in evidence the instructions and they can compare it with the testimony. For her to testify that she followed the instructions would be her conclusion.

The Court: There may be some merit to the objection, but I think I'll overrule it, and let the answer be read.

A. Yes, I believe they are the same ones.

Q. All right. Now I show you Plaintiff's Exhibit "F" and ask you whether or not this is the same type of package and container in which the Cara Nome pin curl which you used on February 5th on Sandra Nihill—— [272]

A. That is the same.

Mr. Lanier: And may the record show that Exhibit "F" is such a kit as has been testified to by the witness, and that Exhibit "E" is the directions

(Deposition of Mrs. Adaline Jorgenson.)
from that kit which are being replaced in Exhibit "F" at the time of the taking of this deposition.

Q. Mrs. Jorgenson, how long have you known Sandra Nihill?

A. Oh, for the last 17 years.

Q. Not Sandra——

A. Not Sandra, but I have known Nihills that long. I have known Sandra ever since she was born.

Q. Ever since she was born. All right. Now, have you ever had occasion to give Sandra Nihill herself a home permanent wave other than this?

A. Yes.

Q. Was that before or after the application of Cara Nome? A. That was before.

Q. Do you recall for sure what kind of a wave you gave her?

A. I believe it was a Toni end curl.

Q. And could you state as to whether or not—scratch. Did you follow the directions in that particular home wave? A. Yes. [273]

Q. And can you tell me what results were obtained? A. It turned out nice.

Q. The hair was exactly as prior to giving it?

A. Yes.

Q. Then this would be the second wave, the Cara Nome wave, would be the second wave that you had given her? A. Yes.

Q. And, of course, there is nothing there to wave any more? A. No, there isn't.

(Deposition of Mrs. Adaline Jorgenson.)

Q. Do you see Sandra very often around her school activities or home since——

A. Oh yes.

Q. ——this wave? A. Yes.

Q. Do you know from your own personal observation that the hair in relativity to growth has been about approximately the same now as since losing it in 1955?

A. I would say it was about the same.

Q. Do you know of your own knowledge by observation whether or not the loss of the hair, her association among other children, students in school and grown people, has caused Sandra a great humiliation and embarrassment? [274]

A. I know it has.

Q. And from your observations of Sandra has it or not affected her personality?

A. Yes, I would say it has.

Q. From your own personal observation of her do you know as to whether or not it has caused her great and grievious mental suffering and disturbance?

Mr. Packard: The question calls for a conclusion of this witness.

The Court: It seems to me so, yes, Mr. Lanier.

Mr. Lanier: It's asking from her observation in a small area and a close association, your Honor.

Mr. Packard: Mental suffering and disturbance is something for a medical question.

The Court: I'll let her answer.

(Deposition of Mrs. Adaline Jorgenson:)

A. Well she didn't like to take part in things like she use to do when she had hair.

Q. All right. What was the condition of her hair, Mrs. Jorgenson, at the time that you started giving her the Cara Nome permanent?

A. She had beautiful hair, and lots of it.

Q. And lots of it?

A. She had lots of hair. [275]

Mr. Lanier: Your witness.

Do you want me to continue the recross?

Mr. Packard: Yes. You go ahead.

Mr. Lanier: (By Mr. Jungroth)

Q. When was this Toni end curl given?

A. Oh, that must be about a year or year and a half before I gave her the Cara Nome.

Q. And was there curl in her hair at the time you gave her the Cara Nome? A. No.

Q. How was she wearing her hair then?

A. Pony tail, I think.

Q. Now, I believe that you testified on direct examination that the solution was kept out of her eyebrows. Do you know——

A. Well, I tried to keep it out, but there is a little bound to seep through the towel.

Q. And she had a towel on her forehead?

A. But the towel gets wet and when you go to wipe it off, it gets a little on your——

Q. She didn't complain of any being in her eyes? A. Not to my knowledge.

Q. And was this towel you put on her forehead, [276] was there any neutralizer placed in that?

(Deposition of Mrs. Adaline Jorgenson.)

A. Well, not until I put the neutralizer on her head, then it would drain off her head on to the towel.

Q. Did you notice her scalp at the time that you put on the solution?

A. It seemed to be in good health. She didn't have any sores or anything on her head.

Mr. Jungroth: I believe that is all.

Mr. Lanier: How about dandruff, did you notice any dandruff, Mrs. Jorgenson?

The Witness: No, I didn't.

Mr. Lanier: Do you know that there was no dandruff?

The Witness: I don't believe she had any dandruff.

Mr. Lanier: That's all.

Mr. Lanier: May it please the Court, I do not believe it's a matter for the jury—at least at this time—may I have the original please—but I request the Court to read and take note of the record on the last page following that deposition. [277]

(The Court reads to himself the material requested by counsel.)

Mr. Packard: I submit to the Court—your Honor may want to read it, but I think it's immaterial——

Mr. Lanier: I am not sure at all it's material at this time either, counsel, but it depends on what develops as we go.

The Court: I don't see there is anything there I can do about it——

Mr. Lanier: I just wanted the Court to take

note because something might come up down the line that I have not anticipated yet.

Could I have Dr. Martin's deposition?

(The Clerk furnished counsel with Dr. Clarence S. Martin's deposition.)

Whereupon,

DEPOSITION OF DR. CLARENCE S. MARTIN witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows:

Dr. Clarence S. Martin, a witness called at the request of the plaintiff, being first duly sworn to testify to the truth, the whole truth, so help him God, thereupon testified as follows: [278]

Direct Examination

Q. (By Mr. Lanier): Would you state your name? A. Dr. Clarence S. Martin.

Q. And where do you live, doctor?

A. Kensal, North Dakota.

Q. Are you a Doctor of Medicine? A. Yes.

Q. And how long have you been practicing in Kensal, North Dakota? A. Nine years.

Q. Would you tell me, Doctor, where you got your Medical Degree?

A. The University of Pennsylvania in Philadelphia.

Q. In what year? A. 1943.

Q. And where did you do your internship?

A. The Presbyterian Hospital in Philadelphia.

Q. And what year did you finish that?

(Deposition of Dr. Clarence S. Martin.)

A. 1944.

Q. And since that time have you, Doctor, gone to any further medical school?

A. I spent a little over two years in the Army, and I spent, after my Army term was up, from which I was—what would you say, dismissed? How do you get out? [279]

Mr. Jungroth: Discharged.

A. (Continuing) I was discharged as a Captain, I spent six months in a refresher course in medicine and surgery at Harvard Medical School.

Q. Have you had any further education or training than that, Doctor? A. No, sir.

Q. Have you practiced medicine, with the exception of your Army practice, in any other community other than Kensal? A. Yes.

Q. And where was that, Doctor?

A. At Elwin, Pennsylvania.

Q. How long did you practice there?

A. For approximately a year.

Q. So that you have actually practiced your profession of medicine for the past 14 years, is that correct? A. Approximately so, yes.

Q. Doctor, you are, I believe, a general practitioner, is that correct? A. Right.

Q. You are not a specialist in any particular field? A. No, sir.

Q. And in particular you do not claim to be a dermatologist? A. That is true. [280]

Q. Your practice at Kensal is of the general practice the nature of which covers every possible

(Deposition of Dr. Clarence S. Martin.)

matter of sickness and injury that a patient can come in to see you on I presume? A. Yes.

Q. All right. Now, Doctor, refreshing your mind, have you ever had occasion to have as a patient a minor child by the name of Sandra Nihill?

A. Yes.

Q. And approximately, and generally speaking, how long has she been a patient of yours?

A. I saw Sandra Nihill first on the 29th of October, 1948 and have doctored her on four occasions, well, three occasions previous to the incident which I saw her concerning her loss of hair.

Q. And, Doctor, have you not also been the general family doctor for her entire family?

A. Yes, sir.

Q. And you are well acquainted with the Nihill family? A. Yes, sir.

Q. And are thoroughly versed in their physical background? A. Yes, sir.

Q. And, Doctor, from your observation, from your treatment and from your general history of the treatment of Sandra Nihill, can you state for the benefit of the [281] jury what her general physical condition has been prior to the particular point in question and up to that time?

A. She has been a healthy, normal girl, quite active in sports, and with no unusual ailments or illnesses.

Q. And can you tell me, from her family background, the other members of her family, particularly her father and mother, from your same obser-

(Deposition of Dr. Clarence S. Martin.)

vations and experience as their family doctor, what the general status of their health has been?

A. The family has been in good health. The illnesses have been always of a minor nature.

Q. Well, now, for instance the other illnesses of Sandra Nihill prior to your examination of her in February in 1955 have been of what nature generally?

A. Well, from my records I copied the following list: I saw her on the 29th of October, 1948 for a slight cold, cough and ear ache, which cleared up under medication right away. Again on the 15th of February, 1949, she had another head cold with a slight catarrhal otitis, a coat on the ear. And on the 13th of July, 1949, she came in with abdominal pain, which I wanted to exclude appendicitis, and and excluded appendicitis. Mesentery adenitis was my diagnosis for that particular ailment. That [282] means a cold in the abdomen.

Q. Now, Doctor, in the entire case history, in your experience as a family doctor, has either Sandra Nihill or any of the members of her family, particularly her father and mother, or any other members, had any indication to you of any skin allergies of any kind? A. No.

Q. And both during the time of this hair loss, and since, have you at any time found any indication of a skin allergy?

Mr. Packard: You were going to withdraw the question and reframe it, counsel.

Mr. Lanier: All right.

(Deposition of Dr. Clarence S. Martin.)

Q. At any time, prior to this hair condition, during your examination of the hair condition and scalp, or since, in the case of Sandra Nihill, have you ever had any occasion to find, or indication of any allergy? A. No.

Q. Now, Doctor, when was the first time, after the application of the Cara Nome Rexall permanent cold wave home solution, and on what date thereafter, did [283] you first see Sandra Nihill?

A. I saw Sandra Nihill on the 28th of February, 1955.

Q. You first saw her on the 28th of February, 1955, for this particular scalp and hair condition?

A. Because she was losing hair in large amounts.

Q. Now, Doctor, would you please state for the benefit of the jury the general condition of her scalp at that time?

A. She showed rather extensive loss of hair. There was some irritation on her scalp, and I was suspicious at first of a fungus infection of the scalp as the cause, so I looked at her head, scalp, in a dark room under the Wood's light, which will show up fungus infections, and I didn't see any indication of fungus infection, and I paid particular attention to the areas in which I saw some inflammation which showed any scaling and slight dermatitis.

Q. So you did find slight inflammation, scaling and dermatitis? A. Yes.

Q. Now, Doctor, as a result of that original ex-

(Deposition of Dr. Clarence S. Martin.)

amination, did you make any prescription for use of Sandra? A. Yes.

Q. And what was that, Doctor? [284]

A. I prescribed salsum, which is an Abbott's prescription, for the treatment of seborrheic dermatitis.

Q. Now, Doctor, is that or not, in the general practice of medicine in your locality, area, a standard and accepted medication for the use in treatment of the scalp where you have the findings such as you have described?

A. Yes. If the scalp is not too inflamed, it is indicated in treating mild inflammations of the scalp such as due to ring worm or seborrheic dermatitis.

Q. Now, Doctor, when did you have the next occasion to see Sandra Nihill?

A. Well, I had seen her once before that, in February, I might mention, in a routine basketball examination before the tournaments.

A. All right, one moment on that. Now what date in February had you seen her?

A. I don't have the date, I didn't note that on her record because it was a routine school basketball examination, but it was previous to the basketball tournaments, a few days previous to that, or it must have been more than that. Anyway, the girls had not had their basketball examination and the tournaments were coming up, and they were sent down to my office for examination, and I [285] failed to look up the date, but it was in the prox-

(Deposition of Dr. Clarence S. Martin.)

imity of a week or so before the basketball tournament at which time I found nothing wrong with Sandra Nihill, nor did I find anything wrong with any of the other girls.

Q. Yes. She was examined just as one of many on the basketball team? A. Yes.

Q. All right now, Doctor, after your examination of February 28th when did you next examine Sandra Nihill?

A. My records show on the 6th of July, 1955.

Q. Will you tell me what the result of your examination and observations at that time were?

A. At that time she had lost practically all of her hair, and there were some short hairs growing in the bald areas to maybe a half an inch or so.

Q. Do you recall, and do your records show, what the condition at that time of either inflammation, irritation, or scaling was?

A. There wasn't any inflammation or irritation that I noticed on the scalp at that time, but I was quite concerned and called Dr. Sorkness in Jamestown to get the name of a reputable dermatologist so I might send her for examination and evaluation.

Q. And what name did you get? [286]

A. Dr. Melton from Fargo.

Q. He is with the Dakota Clinic in Fargo?

A. Yes.

Q. And did you not cause her to be sent to Dr. Melton for examination? A. I did.

Q. And since that time, for the scalp condition,

(Deposition of Dr. Clarence S. Martin.)

has she any further been your patient since that time? A. No.

Q. Have you had occasion, nevertheless, to see Sandra locally in Kensal in social or school activities, functions, since then?

A. Well, I see her now and then during the week, pass her on the street. Other than that I have had no professional contacts with her.

Q. I believe you are also president of the school board of Kensal, are you not, Doctor? A. Yes.

Q. And interested in school activities?

A. Yes.

Q. And in connection with that, and in the smaller town of Kensal, you do see her occasionally?

A. That's right.

Q. Do you know of your own knowledge that her hair is in approximately the same condition as it was when you last saw her? [287]

A. You mean on the 6th of July?

Q. Yes, by observation.

A. I have not seen her without covering on her head since the 6th of July.

Q. Since that time. All right, Doctor. Now, Doctor, based on your medical training and education, based upon your general experience in the practice of medicine, based upon your personal observation, diagnosis, and prognosis, of Sandra Nihill, have you or not an opinion, based upon reasonable medical certainty, as to whether or not the condition of baldness in the scalp, head and hair of Sandra is or is not permanent? A. I have a——

(Deposition of Dr. Clarence S. Martin.)

Mr. Lanier: Let's hold to make sure.

Mr. Packard: One moment.

Mr. Lanier: Take your time, counsel.

(Counsel for defendants confer.)

Mr. Packard: I have no objection.

A. I have a qualified opinion.

Q. All right, would you please state that opinion, Doctor? [288]

A. Well, I would, my opinion is that this loss of hair may well have been due to the home permanent, but certainly I do not feel it can be proven for sure one way or the other.

Q. Now, Doctor, I am going to come to that question, because that actually does not quite embody the question which I asked you. My question only asked as to whether or not you felt the loss of hair, and the scalp condition, was permanent, yes or no?

A. I didn't answer your question directly——

Q. And now you may answer.

A. I would feel that there was more probability that this will be a permanent loss of hair than that it will not be, although I am in no position to say definitely one way or the other.

Q. All right now, Doctor, I want to ask you one more question which you really, in a way, have answered already, but so I get in the foundation to it I want to repeat it. Based upon your medical training and experience, based upon your observation, diagnosis and prognosis of the patent, Sandra Mae Nihill, do you have an opinion, based upon

(Deposition of Dr. Clarence S. Martin.)

reasonable medical certainty, as to whether or not the application of a cold waving, cold wave solution to the scalp of Sandra Nihill, on or about February 5th, 1955, containing a chemical solution of ammonium thioglycollate, could [289] cause the condition of the scalp that existed as you saw in Sandra Nihill on February 28th, 1955, and July 6th, 1955?

Mr. Packard: Just a moment, Mr. Lanier. I object your Honor. It is an improper hypothetical question in that it does not have a proper basis for a hypothetical question. Any specific ingredients of thioglycollate acid, and so forth. He says "a solution", and we know that all these wave solutions have the same basic ingredients and certainly it would be speculation, it says "could have caused", and we are not dealing with speculation, but within reasonable medical certainty.

The Court: I think that was included in the answer to the question, was it not?

Mr. Lanier: It was, your Honor.

The Court: The answer may be read.

A. Yes.

Q. Would you state that opinion, please?

A. I feel, from the presence of the——

Mr. Packard: The same objection, your Honor.

The Court: You may have you objection and exception.

A. I feel, from the presence of the inflammation in her scalp, and the absence of any evidence

(Deposition of Dr. Clarence S. Martin.)

of fungus infection under the Wood's light, that this condition which I saw on her scalp and in her scalp on the 28th of February, 1955, may well have been due to a chemical irritant such as you mentioned was in the home permanent.

Q. Now, Doctor, do you have with you a copy of your bill for services performed on Sanda Nihill? A. No.

Q. Do you recall personally what that bill was?

A. Four dollars.

Mr. Lanier: Your witness.

Mr. Packard: Do my job for me.

Mr. Lanier: (Resuming reading Cross-Examination.)

Q. (By Mr. Jungroth): Now, Doctor, did you treat this particular patient in question here for diphtheria, Sandra Nihill, was she your patient, was she treated for diphtheria, do you recall?

A. No, sir.

Q. How about scarlet fever? A. No, sir.

Q. Or Pneumonia? A. No, sir.

Q. Typhoid? A. No, sir.

Q. Not at least during the time you saw her she did not have these particular maladies?

A. Not to my knowledge.

Q. And I believe you stated that prior to the time that this hair issue came up that you saw her on three occasions. Now, you saw her for a cold on October 28th, 1948? A. Correct.

Q. What treatment did you give her at that time?

(Deposition of Dr. Clarence S. Martin.)

A. I did not bring the record of my treatment with me so I cannot answer the question.

Q. Well, Doctor, on February 15, 1949, I believe you said she had a head cold and a cold in the ear? A. That is right.

Q. What treatment did you give her at that time?

A. As I have previously mentioned, I used the routine treatment for cold, and I didn't bring the record of my treatments with me.

Q. What would your routine treatment for cold be then, Doctor?

A. I would have to suppose in this case, I am not sure what I gave, but I think I used probably some penicillin [292] and one of the antihistamines for congestion.

Q. Would you have given any sulpha drugs?

A. No.

Q. And on July, 1949 she had an abdominal pain that you, I believe, diagnosed, in laymen's language, as a cold or infection in some of the glands of the stomach, is that correct?

A. Yes.

Q. And what treatment did you give for that?

A. If I remember correctly, I gave no treatment. I wanted to differentiate from appendicitis and I felt I substantially did that, and so I didn't treat it.

Q. Were there any further complaints about the abdominal pain.

A. It was just a pain that she had in the right

(Deposition of Dr. Clarence S. Martin.)

side of her abdomen and her parents brought her in to make sure. Her white count was normal and her abdominal examination was not acute, did not show any acute inflammation so I discharged her as not having appendicitis.

Q. And I believe, Doctor, you made some statement in the record with reference to any possible allergy with this girl?

A. I made a statement previously here that there was no evidence of allergy in her.

Q. Yes, that is what I mean. Did you run any of the [293] standard allergy tests?

A. No.

Q. There are a number of tests used for allergies?

A. There are. There are tests used for allergy in which a doctor will maybe run 125 different allergens to test the patient for sensitivity to different things.

Q. You didn't test this patient for sensitivity to ammonium thioglycollate? A. No.

Q. Nor test her for an allergy to any other cosmetic or soap?

A. No. I based that answer on the fact that she has not shown the evidence of allergy that the general practitioner sees so frequently in his practice.

Q. In other words, she didn't have the hives from eating tomatoes or some such thing as that?

A. Asthma or skin rashes, various manifesta-

(Deposition of Dr. Clarence S. Martin.)

tions of allergy are evident to a general practitioner.

Q. Now, Doctor, I believe you stated you saw the plaintiff in February for a routine checkup for her playing girls' basketball at Kensal High School? A. Correct.

Q. What examination was given her at that time?

A. There on the basketball examinations we examine their heart, the appearance of their skin, the throat, we [294] examine for fever, blood pressure, and general appearance.

Q. Do you recall whether or not you examined her scalp?

A. I did not, or I do not recall.

Q. And then, Doctor, I believe that you stated on February 28th, 1955 she contacted you with reference to a scalp and hair condition?

A. Yes.

Q. And at that time were there any pustules evident in the scalp?

A. Not pustules, but there was inflammation.

Q. And was there any scaling at that time?

A. Slight scaling.

Q. Now, Doctor, I believe that you stated that you prescribed a preparation known as selsum which is made by the Abbot Laboratory?

A. Abbot, yes.

Q. Now, that product is primarily used in the case of an infection to the scalp rather than a chemical injury to the scalp, isn't it?

(Deposition of Dr. Clarence S. Martin.)

A. It is used as a preparation to combat fungus infections and seborrheic dermatitis, and also as a stimulant to the scalp itself because of the sulphur which is present. Therefore, I cannot say that it could not be used in a chemical dermatitis, but it [295] might be used as sort of a stimulant to create a better health so that the hair would commence to grow again.

Q. How is selsum used, Doctor?

A. The directions I had for Miss Nihill was that she apply once a week. It is used after a soap shampoo of the hair, massaged into the scalp for five minutes, allowed to stay there for that time, and then rinsed out, and then it is used again for another five minutes and allowed to stay there for that length of time and then rinsed out thoroughly with several rinsing of water so that you do not leave any of the medication in the scalp, and they may use soap on the second rinsing.

Q. And actually selsum, if improperly used and left on the scalp, can cause falling hair?

A. I am not qualified to answer that. It could cause falling hair, but it is a medicine that is not to be left on the scalp.

Q. And then I believe, Doctor, you said that you saw her on July 6th, 1955? A. Yes.

Q. And at that time her hair was substantially gone on her head, is that correct? A. Yes.

Q. And you didn't see her between February 28th and July 6th professionally?

A. No. Now by the time I saw her on July

(Deposition of Dr. Clarence S. Martin.)

28th she had lost much of her hair. There were many large areas of the hair gone and coming out rapidly.

Q. Now, Doctor, when you saw her at that time was it coming out in more or less patches, here and there?

A. It is true that there were areas where there was more hair lost than others. It was just a complete general diffuse loss of hair, but the hair was coming out all over.

Q. But there were patches?

A. There were areas where there was more hair loss than others.

Q. Wouldn't that lead you to an alopecia areata condition more or less?

Mr. Lanier: That question is objected to by myself, your Honor, as not a proper question hypotheically, as not a proper foundation to a hypothetical question, as not including all of the medical or physical facts in evidence.

The Court: What was the question again, please?

Mr. Lanier: Wouldn't that lead you to an alopecia areata condition, more or less?

Mr. Packard: Your Honor, if I may be heard in the matter. It is merely asking a doctor, who is a qualified MD, who expressed many opinions on direct examination, as to causes of permanent damage to the hair, injury to the hair, it's just asking him whether this could not have been alopecia areata.

Mr. Lanier: I'll withdraw the objection, your Honor.

(Deposition of Dr. Clarence S. Martin.)

The Court: You may answer.

Q. That diagnosis was considered by me, and on the basis of inflammation of the scalp, slight inflammation, I did not feel that I was able to make a diagnosis of alopecia areata.

Q. Now inflammation, Doctor, you mean more or less a redness, is that correct?

A. Yes. Some irritation and scaling.

Q. Now, Doctor, I believe that you said your bill for services were $4.00?

A. That is for the 28th of February. I remembered looking at the bill on the back of my card before I left for here. That's why I stated that.

Q. And what all did you do that time you saw her; how much checking did you do with the girl?

A. Well, it was primarily in relation to her scalp.

Q. Now, with relation to the scalp, how much checking did you do? Did you merely look at it under the Wood's light and then under an ordinary light?

A. I looked at her scalp and part of the hair and examined for broken off ends that you see with a fungus infection, where fungus is chewing on the roots of the scalp, and then I took her into the dark room and examined her under the Wood's light.

Q. Did you examine any of the hairs of her head under the microscope to determine whether any of the ends were frayed?

A. No, I did not.

(Deposition of Dr. Clarence S. Martin.)

Q. And, Doctor, you of course actually had no way of knowing of your own knowledge that this particular individual used a home permanent on her head aside from what she told you, is that correct? A. That is correct.

Q. And you, of course, are a general practitioner and don't specialize in dermatology?

A. Correct.

Mr. Jungroth: That is all. [299]

Mr. Lanier: Now, may I have the deposition of Dr. Melton? I believe that is before you, your Honor, and we do have another copy of that, so it can be used by the Court.

The Court: What deposition is that, Mr. Lanier?

Mr. Lanier. That is Dr. Melton.

The Court: You may proceed.

Thereupon,

DEPOSITION OF DR. FRANK M. MELTON

witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows:

Mr. Lanier: (Reading.)

Dr. Frank M. Melton, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Q. (By Mr. Lanier): Would you state your name, please? A. Frank M. Melton.

Q. What is your business?

(Deposition of Dr. Frank M. Melton.)

A. I am a physician and dermatologist.

Q. Where do you live? [300]

A. Fargo, North Dakota.

Q. Are you associated with any clinic in Fargo, North Dakota? A. With the Dakota Clinic.

Q. Where did you get your medical training, Doctor?

A. University of Louisville, Kentucky.

Q. Are you a graduate in medicine of that university? A. Yes.

Q. In what year did you graduate?

A. 1939.

Q. Where did you do your interning?

A. At the General Hospital at Louisville.

Q. Doctor, do you have any special field?

A. Yes, dermatology.

Q. Are you a specialist in the field of dermatology? A. Yes.

Q. Where did you receive your special training?

A. At the University of Pennsylvania and Duke University.

Q. In what years did you receive that training?

A. '46 to '49. The war was over in '45—'46 to '49.

Q. Were you or not in the armed services?

A. Prior to that, yes.

Q. In what service were you?

A. Public Health Service.

Q. How long were you in that field? [301]

A. From '41 to '46.

(Deposition of Dr. Frank M. Melton.)

Q. I presume that you took your special training after you were out of the Public Health Service? A. That is right.

Q. For the benefit of those people who are on the jury who do not understand that, including your present legal examiner, would you state when you take special training, for instance in dermatology, what it results in? Do you get a diploma or a special degree, or just exactly what is it?

A. You are examined by a Board of Examiners and you are certified by that board.

Q. What board of examiners?

A. American Board of Dermatology.

Q. That is a national Board? A. Yes.

Q. You were examined by that board and have passed the qualifications required by them and have been certified as a dermatologist?

A. That is right.

Q. How long in that particular specialty have you been practicing? A. Since '49.

Q. Where has your practice been?

A. In Fargo. [302]

Q. Have you been located in Fargo, North Dakota, ever since? A. Yes.

Q. Have you since that time, after 1949, been associated with the Dakota Clinic? A. Yes.

Q. With which you are still practicing?

A. Yes.

Q. Again for the benefit of the lay people on the jury, will you tell me what the field of dermatology is?

(Deposition of Dr. Frank M. Melton.)

A. It is a study of the diseases of the skin.

Q. That study of the diseases of the skin, does that or not include the scalp and the hair?

A. Yes.

Q. The scalp, I presume, also being a part of the skin and part of the special field of dermatology? A. Yes.

Q. Do you have your records with you in reference to your observation and treatment of one Sandra Mae Nihill? A. Yes.

Q. When, Doctor, did you have occasion to first see Sandra Mae Nihill?

A. On August 9, 1955.

Q. Doctor, would you state briefly for us what the case [303] history you have shows concerning Sandra Mae Nihill when she first came in to see you?

A. You want me to give that in detail?

Q. Refreshing your memory from your own notes, give it as you see fit, as you have it.

A. Her family history, there was no loss of hair. Her past history, she had had pneumonia as a child, and she had a tonsilectomy. There was no illness the previous year. She was examined by myself and by one of our internists and we found no abnormality other than of the scalp.

Q. That, briefly, is your answer to my question as to history?

A. Yes. I haven't discussed the scalp.

Q. All right now, let me ask one or two questions and bring this up to date. You have first of

(Deposition of Dr. Frank M. Melton.)

all stated that she has no history of family baldness. Would you state to the jury why you have inquired into the girl's history in that respect?

A. We inquired into that because some times there is a family type of losing hair; in other words, it will run in families.

Q. Can that be traced to heredity?

A. It would be hereditary, yes.

Q. Did you or not find anything in this girl's family [304] history to trace it to that type of hereditary loss of hair? A. No.

Q. One other thing. You said as a child she had pneumonia. Does that or not have any bearing on the case at all?

A. No, I wouldn't think so.

Q. As to the scalp, would you give her case history there?

A. We found that the hair was short all over the head. There were dark hairs interspersed with very fine hairs. There were many dark hairs broken off at the roots. There were also so follicular pustules in the scalp—that means where the hair has come out of the scalp. There had been a loss of eyebrows. The hair of the axilla and pubic area was sparse, but the mother stated that this is a family trait. The hair was not loose when pulled. There were no other lesions of the scalp, hairline, or rest of the skin. Examination of her by Wood's light showed no abnormalities or fluoresence. Examination of the hair under a microscope showed no spires or mycelium on the hairs.

(Deposition of Dr. Frank M. Melton.)

The hairs were frayed and broken off at the ends. Approximately twenty hairs were examined. Laboratory studies were normal. Radio active iodine test was normal. And a biopsy of the scalp was [305] reported. Sections show somewhat keratinized stratified squamous epithelium which is everywhere composed of mature and well-differentiated cells. The basal layer is well defined. Several hair follicles are seen showing some irregular budding of the follical epithelium. Yet there is no cellular stypia. The follicles contain keratinized material. They appear consequently atrophic. A couple of sebaceous glands are noted. There is no perifollicular infiltrate at all. The aforementioned sebaceous glands are slightly smaller than expected. The basal layer of the epidermis shows no pigmentation. A few sweat glands are also ascertained. Pathological diagosis: The histopathological picture shown by this submitted specimen is compatible with alopecia. It is not possible to differentiate, as to type, since the determining criteria (like inflammatory infiltrates) are absent.

Q. One or two things concerning that case history and finding. First of all, would you tell us by your records what date you first examined this little girl? A. August 9, 1955.

Q. Also could you tell us what your records show her age to be?

A. Her birthdate was 12-2-41.

Q. Making her at the time of the examination 14 years [306] old? A. Fourteen.

(Deposition of Dr. Frank M. Melton.)

Q. Also from your case history, what is the date, if any, in your history shown, that she was first examined and treated for this condition by Dr. Martin of Kensal, North Dakota?

A. I don't know the date when she first saw him.

Q. Was she or not referred to your office or clinic and to you by Dr. Martin?

A. Well, it would be by Dr. Martin and Dr. Sorkness.

Q. Dr. Sorkness being in the Sorkness and Dupuy, the Stutsman County Clinic, I believe, or the Jamestown Clinic?

A. The Dupuy-Sorkness Clinic.

Q. Of Jamestown, North Dakota?

A. Yes.

Q. She was a referred patient from another doctor? A. Yes.

Q. What does your record show in her case history as to when she first had this loss of hair?

A. It was in February of '55. I don't have the exact date.

Q. What do your records show in your case history as to when she made an application or caused an application to be made of the hair wave solution on her hair? [307]

Mr. Packard: I am waiving my objection.

A. According to my history, she had her permanent in '55, February, '55, and you want to know when she began to lose her hair?

Q. Yes. A. Within a week.

* * * * *

(Deposition of Dr. Frank M. Melton.)

A. Within a week she began to lose her hair.

Q. Was that within a week after the application of the hair wave solution?

Mr. Packard: I'm withdrawing my objection to those questions.

A. Yes.

Q. (By Mr. Lanier): You have stated in your findings that inflammation was absent. Will you tell us whether or not on your tests made there was any physical abnormal findings of any kind so far as the scalp was concerned?

A. Let me clarify that. We found a few boils of a special type in that they were around the hair follicles, where the hair comes out.

Q. Did I understand you to say that those were boils? A. Yes.

Q. A boil being what? [308]

A. A boil being a collection of pus, stimulated by either infection or foreign body. In other words, if you get a sliver in your finger, pus or polynuclear cells are formed.

Q. And that finding was an objective finding in your examination of this girl?

A. Yes. To prevent confusion here, the pathologist didn't find any what we call inflammatory infiltrate. It is the same thing, because he is speaking in terms of something deep while I found something on the surface.

Q. And this examination is approximately six months after her original medical examination and treatment for this condition?

(Deposition of Dr. Frank M. Melton.)

A. You mean her being examined by somebody else?

Q. Yes. A. I don't have the date.

Q. From your case history that you do have, this examination takes place approximately how long after her original loss of hair?

A. My examination?

Q. Yes. A. Six months.

Q. Did you or not, Doctor, find any inflammation of the scalp other than you have already described? A. No. [309]

Q. Did you find any scaling of the scalp?

A. Not enough to make any note of.

Q. For the benefit of the jury again, Doctor, would you tell me what the Wood's light is?

A. The Wood's light is a type of ultraviolet light which has a special filter which allows only rays of a certain narrow band of wave length to be emitted.

Q. What is the purpose of the examination by means of a Wood's light?

A. A Wood's light is used for examination for ringworm of the scalp type, in which case the infected hairs fluoresce or glow with a greenish color similar to that seen on a luminous dial of a watch.

Q. You have also stated that you caused to be done a biopsy of the scalp? A. Yes.

Q. Would you explain what that is?

A. To remove a small piece of tissue to send it to a pathologist, who then prepares it in such a

(Deposition of Dr. Frank M. Melton.)

way that it can be cut in very small sections and examined under high-powered microscope.

Q. As a result of this biopsy, and as a result of her family history, and as a result of your own findings, both objectively and subjectively, did you ascertain a physical reason for the loss of hair?

A. No.

Q. Did you find any reason to presume, medically, with a reasonable degree of medical certainty, that this girl had any allergy? A. No.

Q. At one time you used the term "atrophic". Would you explain to the jury first of all by way of repetition what you found as to any atrophic condition within the follicles or the hair bulbs?

A. An examination by the pathologist reported that the hair follicles appeared athrophic.

Q. What do you mean by that statement?

A. I think the simplest way to explain it would be a shrinkage of a tissue.

Q. Do we or not refer to atrophic as a permanent or non-permanent condition?

A. I think it could be either one.

Q. In this particular case which do you refer to it as? A. Not specifically either one.

Q. Not either one? A. No.

Q. When was the last time that you examined this girl? A. September 21, 1955.

Q. Between the time of your first examination of August 9, 1955, and until your last examination of September [311] 21, 1955, did you or not ascertain any difference in regard to hair growth?

(Deposition of Dr. Frank M. Melton.)

A. No, there was not much change.

Q. I will show you plaintiff's Exhibits A and B, which purport to be photographs of Sandra Mae Nihill's skull and scalp. From a purely visual standpoint, would you tell me in general whether or not the scalp and head of Sandra Nihill appear in those two exhibits, A and B, approximately the same as they did to you upon your visual observation both on August 9th and September 21, 1955?

A. Yes.

Q. Doctor, in the course of your testimony you have referred to the term "alopecia". Will you tell me for the benefit of the jury what in medicine, and particularly in dermatology, alopecia as such is? A. Alopecia means the loss of hair.

Q. There is testimony in this case by other doctors to a possibility that Sandra Nihill has a condition known as "alopecia areata". For the benefit of the jury, would you tell me what the term "alopecia areata" means?

A. Alopecia areata is a non-scarring type of losing hair.

Q. What is the cause of alopecia areata?

A. The cause is unknown.

Q. Is that what the term itself implies in medicine? [312]

A. I don't know what the term "areata" actually refers to.

Q. Is alopecia areata in medicine the loss of hair from causes unknown? A. Yes.

(Deposition of Dr. Frank M. Melton.)

Q. I presume "causes unknown" could cover a multitude of unknown reasons?

A. It would be legion.

Q. By "legion", for the benefit of the jury, you mean many? A. No end.

Q. One other thing about alopecia areata, is it or not normal to find any inflammation of the scalp with alopecia areata?

A. Usually there is no change at all.

Q. Would it be correct to state that the finding of any inflammation or scaling of the scalp would be foreign to a general finding of alopecia areata?

A. That would not be the usual finding.

Q. If such a condition existed you would not normally expect alopecia areata?

A. That would be one of the things that would make it questioned.

Q. Based upon the case history which you have of this girl, based upon your own findings, subjectively and [313] objectively, based upon your knowledge of her scalp conditions as a dermatologist, and based upon the further fact that as of this date as we take this deposition, the testimony should show that Sandra Mae Nihill has received no basic return of hair to the scalp, do you have an opinion, based upon reasonable medical certainty, as to whether or not this condition is permanent? You can answer that yes or no.

A. How long has it been, almost two years?

Q. A little over.

A. In view of the fact it has been two years——

(Deposition of Dr. Frank M. Melton.)

Q. Yes or no first, as to whether or not you have an opinion. A. Yes.

Q. Would you state that opinion, please?

A. I think in view of the fact that this has persisted for two years that it is most likely that the hair will not return.

Q. That is your medical opinion at this time?

A. Yes.

Q. Is that your medical opinion? A. Yes.

Q. After that period of time, would it or not be unusual for it to now return?

A. I would say it would be unusual for it to return. [314]

Q. Doctor, are you or not acquainted with a book on dermatology written by a Dr. Donald W. Pillsbury, Dr. Walter B. Shelley, and Dr. Albert M. Kligman and published by W. B. Saunders Company? A. Yes.

Q. Is that a comparatively recent work, widely used by dermatologists?

A. Yes. I don't know how widely it is used. The authors would be known to most dermatologists.

Q. It is a text book with which you are familiar?

A. Yes.

Q. If this text should quote as follows——

Mr. Packard: We object, your Honor, to the use of any text books as being improper in this State. To examine medical witnesses by the use of text books, you——

(Deposition of Dr. Frank M. Melton.)

Mr. Lanier: I think that is correct, Counsel, and I'll withdraw the offer of it right here.

Q. Doctor, normally, in alopecia areata, does the hair normally start its loss in patches?

A. Yes.

Q. And the total loss in the entire scalp area normally would not be compatible with alopecia areata? [315]

A. It could begin—it begins in patches but it could involve the entire scalp.

Q. Normally, you would expect it to begin in patches? A. Yes.

Q. Doctor, are you or not in a general way acquainted with the normal chemical composition of hair wave solution and its neutralizers?

A. Just generally.

Q. Are you acquainted with ammonium thioglycolate? A. Yes.

Q. Are you or not aware that most hair wave solutions contain ammonium thioglycolate?

A. Yes.

Q. Are you aware that most hair wave kits, home kits containing neutralizers normally contain potassium bromate?

A. Yes, I think it is. I am not sure about that.

Q. Will you tell me whether or not from your studies and findings ammonium thioglycolate as such in certain concentrates can or cannot be harmful to the skin or scalp?

The Court: There's an objection there.

(Deposition of Dr. Frank M. Melton.)

Mr. Packard: I object on the ground it is speculative and not a [316] proper foundation laid.

The Court: I think he may answer.

A. It can be harmful in the sense that other allergic reactions can occur in concentrations that are used. Alopecia may occur and toxic reactions have been reported.

Q. And toxic reactions have been reported?

A. Yes. On the toxic reactions there have been controversial studies or reports as to their exact nature.

Mr. Lanier: We can skip that next I believe now, counsel.

Mr. Packard: Yes.

Q. (By Mr. Lanier): Doctor, we have discussed follicles. For the benefit of the jury, can you tell me what a follicle is?

A. A follicle is the structure on your scalp from which the hair grows.

Q. When you say "from which the hair grows" are you talking about each individual shaft of hair?

A. Yes.

Q. And at the base and below the scalp is there or not a hair bulb?

A. The hair bulb grows out of the follicle. [317]

Q. And basically that is about the structure of an individual hair in the head. Is that correct?

A. Yes.

Q. Will you tell me whether or not the natural

(Deposition of Dr. Frank M. Melton.)

oils of one's hair progress up and down these shafts of hair?

A. The oil glands empty into the side of the follicle.

Q. And from there do they or not go on out into the hair shaft? A. Yes.

Q. And conversely, any foreign chemical applied to the hair externally, can that progress down the hair shaft into the follicle and under the scalp?

A. Yes.

Q. And if that chemical were of a harmful nature could it reach the area of the hair growth where it could be harmful?

Mr. Packard: I object to it, that's too speculative.

The Court: Overruled. He may answer.

Mr. Packard: No proper foundation laid.

The Court: Overruled.

Q. (By Mr. Lanier): Medically is that physically a possibility? [318]

Mr. Packard: Object to that question upon the ground—a "possibility", we are not dealing in possibilities or probabilities, but medical certainty. It's too speculative.

The Court: I doubt if medical certainty is required there.

Mr. Packard: Reasonable medical certainty. Possibility? A lot of things are possible.

Mr. Lanier: That's a physical matter, your Honor. That's not a medical opinion.

The Court: He may answer.

(Deposition of Dr. Frank M. Melton.)

A. It can penetrate down through there.

Q. You referred that this patient, at the time you examined her hair to a loss of eyebrows.

A. Yes.

Q. Medically, in relation to alopecia what is your general conclusion on the loss of eyebrows, generally, if any?

A. Loss of eyebrows or hair elsewhere on the body would be more likely to occur with alopecia areata.

Q. Did you find any other loss of hair other than the eyebrows and scalp? [319]

A. The hair elsewhere on the body was sparse, but the mother gave a history that this was a family trait.

Q. If the directions on the bottle and container of the particular hair wave solution here used, and if the proof should so show that those directions first stated a use of approximately one-half of the hair wave solution in saturation of the hair, and after the prescribed time of so many minutes after the curls have been set, and then take whatever remains of that solution and put it in a bowl, the remaining one-half portion left, and pour it over the entire head and scalp, with instructions to catch the residue in a bowl as it poured off your head, from a medical standpoint would it be possible under such a set of directions for the same solution used on your hair to get in your eyebrows?

Mr. Packard: Just a moment, I object to the question on the grounds it's assuming facts not in

evidence. The instructions do not say to pour it over your head.

Mr. Lanier: I will withdraw the question.

The Court: Question withdrawn. [320]

Mr. Lanier: Cross-examination, counsel, by Mr. Jungroth?

Mr. Packard: Maybe, your Honor, this will be a good place to stop.

The Court: I think so. We will let the jury withdraw under the injunction not to talk to anybody about this case, or permit anyone to talk to you about it. Keep your minds free and clear of any outside influences and return to the jury room so as to be ready to be called to the jury box at ten o'clock tomorrow morning. You may withdraw. And the other members of the audience please remain until the jury has withdrawn, please.

(The jury left the court-room.)

The Court: Court may now stand in adjournment until ten o'clock tomorrow morning.

(Whereupon, the hearing adjourned until ten o'clock, April 10, 1958.) [321]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge Presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State of California, on April 10, 1958, beginning at the hour of 10:10 A.M.

There were present, at said time and place, the appearances as heretofore noted.

Whereupon, the following proceedings were had in open court:

The Court: The cross-examination of the deposition, I believe, was being read last night. [1]

Mr. Packard: Well, Counsel, do you want to call your Doctor?

Mr. Lanier: No, this is so short that I'm willing to go through with this. Opposing counsel has again said that we should go ahead and read his cross for him, so we will, your Honor.

The Court: Very well.

Mr. Lanier: This is cross-examination, for the benefit of the jury, of the plaintiff's witness, Dr. Melton, the dermatologist from Fargo, North Dakota.

Thereupon, the reading of the

DEPOSITION OF DR. FRANK M. MELTON

witness on behalf of the plaintiff, was resumed, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows:

Cross Examination

Q. (By Mr. Jungroth): I have just a few questions to clear my own mind up. We were discussing the case history of the patient in Mr. Lanier's examination of you. Isn't the case history of the patient just what this particular patient and her mother told you? [2]

A. Well, my report I have given you would be broken up into two parts. One would be the history, whatever I have obtained from the patient

(Deposition of Dr. Frank M. Melton.)

and her mother. The second, the examination of the patient by myself or from the laboratory studies.

Q. What I was referring to was the history.

A. Yes.

Q. And that was merely gotten from the patient and her mother? A. That is right.

Q. You never saw the father at all?

A. I don't remember.

Q. So you wouldn't know whether he had a heavy head of hair or was completely bald, except for what the mother told you, is that right?

A. Yes, that is right.

Q. And when the mother told you that the lack of pubic hair was a family characteristic you had to take her word for it.

A. That would be her statement.

Q. You didn't examine any of the other family to find out whether that statement was true or not?

A. No.

Q. This was the usual medical practice, to rely on the statement of the patient and the patient's relatives in attempting to arrive at your conclusion? [3] A. That is right.

Q. I believe you said that you examined the scalp and the eyebrow area and discovered that there was a lack of hair on it. Is that right?

A. You mean lack of hair in the scalp. Let me qualify this by saying there is not a total loss of hair.

Q. On the scalp? A. Yes.

Q. But there was a total loss of the eyebrows?

(Deposition of Dr. Frank M. Melton.)

A. Yes.

Q. With reference to the pubic hair of the individual, the other body hair?

A. Yes.

Q. That was very limited?

A. It was sparse, yes, small amount.

Q. If you had seen the patient without the patient communicating anything to you, and you had observed the patient, who had a very sparse growth of hair on the scalp, saw a patient with no eyebrows and very limited body or pubic hair, would your conclusion not be that this is a condition of alopecia areata? A. No, it would not.

Q. Are not those findings very suggestive of alopecia areata?

A. Let me say there is evidence here both for and against that diagnosis. [4]

Q. Would you not be willing to state with reasonable medical certainty that this girl does not have alopecia areata? A. No.

Q. Again will you state what alopecia areata is?

A. Alopecia areata is a condition in which there is a loss of hair, with usually no other skin changes, which usually begins in patches, and they may either have a return of the hair or it may extend and involve the entire scalp with loss of hair.

Q. In other words, it is just growing bald?

A. Yes.

Q. Would you say that describes Mr. Lanier, and it is not unusual?

(Deposition of Dr. Frank M. Melton.)

A. No, Mr. Lanier does not have that type of loss of hair.

Q. It is not unusual for the White or Caucasian race to suffer from this condition?

A. It is not unusual for them to suffer this condition, but it is not the usual type of baldness seen in a male.

Q. But the cause of this alopecia areata is either so many causes that medical science has not discovered it or there is no cause, is that the way to put it? A. It is unknown. [5]

Q. Now the permanent wave solution would be harmful to the eyes if it got in them, would it not?

A. I don't know.

Q. Were allergy tests run on this girl?

A. No.

Q. I have been informed, rightly or wrongly, that a drug known as selsium of the Abbott Laboratory was used in treating this girl. Did you use that drug? A. No, I didn't use it.

Q. What is the purpose of that particular drug?

A. Selsium is a preparation used for the treatment of seborrheic dermatitis.

Q. It would not be used usually in a case of chemical injury of the hair or scalp? A. No.

Q. You would not be willing to state with reasonable medical certainty that this girl's hair would not come back, would you?

Mr. Packard: You objected.

Mr. Lanier: I withdraw that objection, your Honor.

(Deposition of Dr. Frank M. Melton.)

A. Usually if the hair loss has persisted this long, the chances are it will be permanent.

Q. But also the chances could be it could come back? [6]

A. There is that chance, that possibility.

Q. I believe that you stated that you saw this girl for the last time on September 21, 1955?

A. Yes.

Q. You have not seen her since that date?

A. That is right.

Q. So you could not say that since that date that she does not have hair?

A. That is right.

Q. And that you are assuming in your answers that she does not rather than from your own personal knowledge? A. That is right.

Q. To get back to this alopecia areata, I believe that you stated that there are no other changes in the scalp. In certain cases there can be, can there not?

A. I would say it would be very unusual. I would question it.

Q. Did you find scaling? A. No.

Q. The only thing you found you said were boils?

A. Very small, pinhead size boils, and this very short hair which were frayed on the ends when examined by the microscope.

Q. So that actually all that you saw in the patient when she came here and all that your tests revealed was that the girl had very little hair and

(Deposition of Dr. Frank M. Melton.)

that there [7] were some postules (pustules) on the scalp?

A. And that the hair was short and frayed.

Q. And aside from that your investigation objectively revealed nothing?

A. There is one other thing, and that was the atrophic follicles.

Mr. Jungroth: I think that is all.

Redirect Examination

Q. (By Mr. Lanier): There has been some testimony here, both direct and cross, using the term "lack of pubic hair". Is that a correct statement or not?

A. Lack? No, it was not a total loss.

Q. In other words, your answer to that was "sparse"? A. Yes.

Q. In a girl of 14 was the condition of the pubic hair anything unusual?

A. No, because there can be a wide range in the amount of pubic hair, depending on the heredity of the patient and the development of the patient.

Q. Counsel asked you about the use of a medication known as selsium. Is that or not a standard dermatology drug or medicine for use in cases where there is an apparent scaling of the scalp?

A. Yes.

Q. And that a dermatologist would prescribe where there is scaling?

A. Yes. That would not be the only type, but it is a well accepted type.

(Deposition of Dr. Frank M. Melton.)

Q. If the testimony should show that Dr. Martin of Kensal, did prescribe the use of the selsium after ascertaining there was scalp scaling would that be an accepted medical practice? A. Yes.

Q. And that finding, also, Doctor, would be inconsistent with the finding of alopecia areata?

A. The finding of scaling?

Q. Yes? A. Yes.

Q. One question on the finding of atrophy. When we speak of atrophy, for instance, in a more general field which we, as laymen, are acquainted with, for instance of a muscle or a nerve, do we or not mean the physical shrinking up and nonusability of that muscle or nerve? A. Yes.

Q. I suppose that atrophy in the term that you have used it is the same thing? A. Yes.

Mr. Lanier: That is all. [9]

Mr. Lanier:

Recross Examination

Q. (By Mr. Jungroth): Doctor, I believe that you stated to me that you would not approve of the use of the selsium if there was chemical damage to the hair and scalp. Is that correct?

Mr. Lanier: That was objected to, your Honor, as a misstatement of testimony, which it is, but I withdraw that objection because of the answer.

A. I would not use selsium if there was a dermatitis of the scalp—dermatitis or burning of the scalp.

Q. And this condition of the patient could have

(Deposition of Dr. Frank M. Melton.)

been caused by an allergy, could it not?

A. I don't think so. This would not be the usual allergic type of reaction, because there was no other symptom of an allergy. Loss of hair could accompany an allergic reaction.

Q. But allergies are strange things that no one completely understands?

A. That is right, but there are certain symptoms and signs of an allergy that you make the diagnosis on, and there was no history of erythema, which is redness, no history of any vesicles or blisters, following [10] the application of the permanent.

Q. And, of course, the history was what you were informed by others?

A. The patient and the mother, that is right.

Mr. Jungroth. That is all.

Redirect Examination

Q. (By Mr. Lanier): From your own findings, both subjective—which is what has been told you—and your own objective findings, or pathological finding, and every other physical finding that you made, was there any indication from all of these findings of any allergy? A. No.

Mr. Lanier: That is all.

Mr. Jungroth: That is all.

Mr. Lanier: At this time, may it please the Court, I would like to call to the stand Dr. Harry Levitt. [11]

DR. HARRY LEVITT

called as a witness on behalf of the plaintiff, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct Examination

Q. (By Mr. Lanier): Would you state your full name, please, Doctor? A. Harry Levitt.

Q. And where do you live, Dr. Levitt?

A. In Los Angeles.

Q. And what is your profession?

A. I'm an M.D.—Dermatologist.

Q. Now by an "M.D.", you mean, of course, that you are a doctor of medicine? A. Yes.

Q. And by dermatologist you mean that you have a special field of dermatology? A. Yes.

The Court: How do you spell your name, Doctor?

The Witness: L-e-v-i-t-t.

The Court: Thank you.

Q. (By Mr. Lanier, resuming): Where did you receive your [12] medical training, doctor?

A. I went to medical school at the University of California in San Francisco, and I took my internship and residency in Los Angeles County General Hospital.

Q. And what year did you graduate from medical school? A. In 1941.

Q. What year did you finish your residency?

A. In 1949.

Q. And between the years of 1941 and '49,—

(Testimony of Dr. Harry Levitt.)

let's go back to '41 first, Doctor. Upon completing and getting your medical degree, what did you do?

A. I took my internship.

Q. Where did you take your internship?

A. Los Angeles County Hospital.

Q. And when did you finish that?

A. I finished that in August of 1941.

Q. Following the completion of your internship, where did you go? A. I went to the Army.

Q. United States Army? A. Yes, sir.

Q. In the Army, where were you stationed?

A. I was stationed in the Philippines, when the War started.

Q. At the outbreak of the War?

A. Yes, sir. [13]

Q. Were you practicing medicine with the Army? A. Yes, sir, I was.

Q. You were a doctor with the United States Army at that time? A. I was.

Q. Were you not taken prisoner?

A. I was.

Q. And for the three years that you were in prison, did you or not—in a Japanese prison camp—did you or not, continue your practice of medicine?

A. I practiced medicine most of the time.

Q. As a prisoner? A. Yes.

Q. Upon American prisoners?

A. On American, occasionally Japanese civilians.

Q. Now, when did you return to the United States, Doctor? A. In 1946.

(Testimony of Dr. Harry Levitt.)

Q. And did you again take up your practice of medicine?

A. I went to the hospital at that time for further training.

Q. Further training in what field?

A. Dermatology.

Q. Where did you take this training?

A. At Los Angeles County General Hospital and University of Southern California. [14]

Q. How long did that training take, Doctor?

A. Three years.

Q. When did you complete it?

A. In 1949.

Q. And did you then become a specialist as a dermatologist?

A. Yes, I became a Diplomate of the American Board of Dermatology.

Q. And would you state what that entails and what you now hold in it, doctor, what it means to the laymen on the jury?

A. Well, it's an examination to license you, or at least establish a proficiency in a particular type of speciality.

Q. And is that today your only type of medicine that you practice? A. That is right.

Q. Dermatology? A. Yes, sir.

Q. Where is your office located, doctor?

A. At 5221 Wilshire Boulevard.

Q. How long have you practiced dermatology in the city of Los Angeles or this area?

A. Since 1946.

(Testimony of Dr. Harry Levitt.)

Q. Which would be approximately twelve years?

A. Twelve years. [15]

Q. Doctor, have you had occasion this week, to have examined one Sandra Mae Nihill?

A. Yes, I did.

Q. And was that examination made at my request? A. Yes, sir, it was.

Q. From that examination, doctor, did you also receive from her and her mother her entire case history? A. Yes, I did.

Q. Did you or not also read the depositions of Dr. Martin and Dr. Melton, her attending physicians? A. I did.

Q. So that you are familiar with the case history and background as given by those two doctors?

A. Yes, I am.

Q. And did you also read the deposition of Dr. Michelson of Minneapolis, taken by the defendant?

A. Yes, I did.

Q. So that you are generally, at least, familiar also with that deposition? A. Yes.

Q. And whatever case history background it includes? A. Yes.

Q. Now then, doctor, would you state for the jury what your personal findings of Sandra Mae Nihill at this time were, from your own examination? [16]

A. Well, at this time, I felt that she was a well-developed and nourished girl. The scalp of her hair was short, sparse, some of it varied in texture and color. The hair did not break easily and it

(Testimony of Dr. Harry Levitt.)

was well fixed in the scalp. There was moderate scaling of the scalp. The eyebrows and lashes were partially gone. The axillae were shaved and there were—the hair of the pubic area was sparse with areas of almost complete alopecia, almost complete lack of hair. Examination of the female genitalia revealed perfectly normal genitalia. There was a scaling eruption of both inner thighs——

Mr. Lanier: One moment, Doctor.

(Counsel conferred with the plaintiff, and she left the court-room.)

Q. (By Mr. Lanier, resuming): Now, doctor, in the examination of Sandra Nihill, based upon your own examination of her and based upon your own education and experience as a doctor, and based upon her case history, could you tell me whether or not you reached any conclusion as to what her present condition is? A. Yes.

Q. Would you say what conclusion you reached?

A. I believe that she has alopecia areata. [17]

Q. And that is your now diagnosis?

A. Yes.

Q. Now, because there has been so much testimony on alopecia areata, doctor, would you tell the jury in as close to our terms as possible, what alopecia areata is?

A. Well, alopecia areata is a loss of hair, usually very sudden, which may be from a very small area to an almost complete loss of hair. Usually it's unattended by any changes except the sudden loss

(Testimony of Dr. Harry Levitt.)

of hair. That is, there is no redness or scaling or itching, the hair just falls out.

Q. All right, now that is a description of alopecia areata. Is that correct?

A. That is correct.

Q. Now, doctor, will you tell me whether or not, based upon your education, experience and training, and based upon the case history of this girl as given to you, and based upon your own examination, will you tell me whether or not you have an opinion based upon reasonable medical certainty, as to whether the original hair loss to this girl could be caused by a chemical? Yes or No, Doctor?

A. Yes.

Q. Would you state that opinion, please? [18]

Mr. Packard: Well, I object to the question upon the ground there's no proper foundation laid and this has no probative force, as to a chemical—I mean it's irrelevant and incompetent.

The Court: Of course that probably is involved in the case history.

Mr. Lanier: It's all involved in the case history, your Honor, and it's also involved in the testimony which is now in this record which the doctor testifies that he has read.

Mr. Bradish: Your Honor, before I make an objection, may I inquire on voir dire of this witness?

The Court: Yes, you may.

Questions by Mr. Bradish:

Q. Doctor, were you given a history that this

(Testimony of Dr. Harry Levitt.)

young lady had had a chemical applied to her hair?

A. That she applied a cold wave permanent.

Q. You don't have any history that a chemical was applied?

A. Well, a cold wave permanent consists of a chemical.

Q. Well that's your opinion. Do you have a history, sir, that there was a chemical applied to this girl's hair [19] at any time?

A. Well it depends on the definition of "chemical". Water itself is a chemical. Something was applied to the hair.

Mr. Bradish: Well, I'm going to have to object to the question on the ground it assumes facts not in evidence, unless we have some identification of the chemical, because the doctor, by his own testimony, admits that even water is a chemical.

Mr. Packard: It's immaterial too.

Mr. Bradish: (Continuing) Until we tie down the chemical, your Honor, I don't think this doctor can give an opinion.

The Court: Overruled. You may answer.

The Witness: I may answer?

The Court: Yes, you may answer.

A. Yes.

Q. Your answer was "yes", doctor. Now will you give your opinion?

A. Now I've lost track of what you were asking, in the [20] meantime.

Q. I asked you, doctor, with all the other foundation in it, so I don't have to repeat it all, whether

(Testimony of Dr. Harry Levitt.)

or not, based upon reasonable medical certainty, you have an opinion as to whether the original loss of hair to this girl could have been caused by a chemical? A. Yes, sir.

Mr. Packard: Object—too speculative.

Q. State that opinion, doctor.

Mr. Packard: It "could have been caused" is too speculative. It isn't within reasonable medical certainty.

The Court: I understood the original question contained the element of reasonable medical certainty.

Mr. Packard: Yes, but he reframed the original question.

The Court: I believe he did that.

Mr. Lanier: I'll ask the question all over again, your Honor.

Q. (By Mr. Lanier, continuing): Doctor, based upon your experience and your education as a doctor; based upon the case history of this girl with which you [21] have become acquainted; based upon the case history as given by the two attending physicians, and based upon your personal observation and examination of this girl, do you have an opinion, based upon reasonable medical certainty as to whether or not the original hair damage was caused by a chemical? To which you answered "yes." Now would you give that opinion please, doctor?

Mr. Packard: We have the same objection.

The Court: The same objection is noted on be-

(Testimony of Dr. Harry Levitt.)

half of each of the counsel, for the defendants, and the doctor may answer the question.

A. I believe that a cold wave permanent could have caused the original loss of hair.

Mr. Packard: I move to strike the answer on the basis that the answer shows that it's merely speculation and conjecture. "I believe it could have caused." We're dealing within reasonable medical certainties here, and "I believe it could have caused" is dealing in speculation and conjecture, which I believe your Honor will instruct the jury they shall not consider.

The Court: I don't think so; the answer may stand. [22]

Q. (By Mr. Lanier, continuing): Now, doctor, in your experience, in the light of your practice—even here in this area—have you or not had many cases in your office of damage to hair and scalp by home wave solution? A. I have.

Q. So that that in itself is not unusual?

A. That's right.

Q. Now, doctor, I believe also at one time that you wrote a paper and submitted it to what organization was that, doctor?

A. Journal of Investigative Dermatology.

Q. And that subject, I believe covered the absorption of chemicals into the skin, did it not?

A. Of one particular chemical.

Q. And will you state whether or not chemicals can be absorbed into the skin?

A. They can be.

Q. Now, doctor, when a young girl of thirteen

(Testimony of Dr. Harry Levitt.)

years of age, suddenly loses all of her hair, will you tell me whether or not, medically, that is subject to creating a shock within that girl's system?

Mr. Bradish: Just a minute. That's objected to as being outside the scope of this doctor's qualifications. He is [23] qualified as a dermatologist, which deals with skin disorders, and I think this question calls for the testimony of somebody in the field of psychiatry.

Mr. Lanier: If the Court please, this doctor has testified that he has handled this type of loss of hair patient, he's a doctor, he's a medical man, he's qualified to testify upon the reactions to patients of this general category without being a psychiatrist.

The Court: You may answer it.

A. I believe it could cause an emotional shock.

Q. And from your examination of this particular girl, doctor, do you have an opinion based upon reasonable medical certainty as to whether or not it did cause an emotional shock to this girl?

A. I think it did.

Q. Now, doctor, will you tell me and this jury one of the principal known causes of alopecia areata?

A. Emotional tension is one of the causes of alopecia areata.

Q. Is there any other cause that's very well known of, doctor?

A. Otherwise the causes are unknown.

Q. And emotional shock is the only known cause? [24] A. That is correct.

(Testimony of Dr. Harry Levitt.)

Q. Doctor, are you acquainted with the Abbotts' Laboratory preparation of selsam?

A. It's selsum. (Spelling) s-e-l-s-u-m.

Q. We've got it spelled about six ways in six different depositions. S-e-l-s-u-m—are you acquainted with it, doctor? A. I am.

Q. What is its use?

A. It's used in seborrheic dermatitis. The simple name for it is dandruff.

Q. And is a normal application for scaling of the scalp? A. It is.

Q. Are there any known cases in medical annals, doctor, of selsum causing loss of hair?

A. About two years ago, there was a report on a few cases, but apparently it was never authenticated.

Q. Any within your experience? A. No.

Q. Does dermatology accept selsum as any possible cause of loss of hair? A. No.

Q. Is it or not an accepted treatment for scalp scaling? A. It is. [25]

Q. Doctor, will you explain to the jury what is meant by the term, which has been used several times here, "seborrheic dermatitis"?

A. Seborrheic dermatitis is dandruff, and of course the commonest symptom of dandruff is just simple scaling, and it can be from simple scaling to very severe irritation and inflammation with scaling.

Q. Is it ever accompanied by rapid loss of hair?

A. No.

(Testimony of Dr. Harry Levitt.)

Q. Doctor, from your examination of this girl and from her case history and from the depositions of the attending physicians, is there anything to indicate any allergy of any kind? A. No.

Q. Now, doctor, based upon your training, education and experience; based upon the case history that you've gotten from this girl; based upon the depositions of attending physicians which you have read; based upon your own personal observations and findings, at this time, over three years after the original loss of hair, do you have an opinion based upon reasonable medical certainty as to whether or not that hair loss is permanent? A. Yes.

Q. Will you state that opinion? [26]

A. Regrowth of hair would be unlikely.

Q. At this time? A. At this time.

Mr. Lanier: Your witness.

Cross Examination

Q. (By Mr. Packard): Doctor, I would like to take a look at your records, please. (The witness furnished counsel with his records.) What's this word here? A. "No shampoo."

Q. What does this say "neutralizer, no shampoo"?

A. Yes. It's my own abbreviation. I said, "Mother and friend applied cold wave permanent, followed instructions." That is they followed the instructions as given. Neutralizer was used, no shampoo followed.

Q. Why don't you just read—I can't read your

(Testimony of Dr. Harry Levitt.)

writing, doctor. Why don't you just read this history there?

A. Do you want me to begin at the beginning?

Q. Well, no. Right where you left off here, "Dry and——

A. (Reading): "Dry and one week later hair began to fall. No pain. Did not seem to break, only fall out to almost complete loss, and scattered * * *. Eyebrows also came out. No symptoms, little regrowth. Basal metabolism is o.k. General health is good. Blood and urine apparently normal." There was a question of a blood iodine test. I couldn't decide, from the history, if they did or did not take a blood iodine test.

Q. Just a moment. This history is what you gathered from reading the depositions——

A. No. This is from questioning the patient and from reading the depositions.

Q. I was wondering about the iodine test.

A. I asked the patient if they had a blood iodine test. (Witness continues reading from his record.) "Menarche at the age of 12." That is she started to menstruate at the age of 12, "was regular, periods lasted eight days, she has a normal flow, she has no pain with her periods. There's no family history of eczema, hay-fever or asthma; no family history of hair loss. The mother, at the age of forty-five, has two sisters, one thirty-one and twenty-nine, three uncles and three aunts on the father's side with apparently normal hair, and the mother, all the hair is all right. There's no known tension and the pa-

(Testimony of Dr. Harry Levitt.)

tient stated that she had little reaction to the fall of hair. She has two—— [28]

Q. Well, now "little reaction to the fall of hair," what do you mean?

A. I asked her how upset she was when her hair fell out and she said that it didn't bother her.

Q. Well now, doctor, with that history, if she had no reaction to her hair falling out and it didn't bother her, do you feel still in your testimony that an emotional shock would be the cause of alopecia areata in this case when there are many unknown causes?

A. Not many. The principal cause is thought to be emotional tension.

Q. Now you say is "thought to be emotional tension," but that's one of them and, actually, as far as dermatology is concerned in the medical profession, the etiology is really unknown. It's known that certain things cause it and one of them may be nervous tension, upset, emotional and so forth. The——

A. Most dermatologists, at the present time, believe emotional tension is the most important factor in alopecia areata.

Q. Now, emotional tension, such as emotional tension of a girl playing in a basketball tournament, becoming excited and tense over school activities, is emotional tension, isn't it?

A. Well they feel that twenty-five percent of alopecia [29] areata is due to sudden emotional shock. At one time we thought that all alopecia areata was due to a sudden emotional shock. At the present

(Testimony of Dr. Harry Levitt.)

time we feel that about twenty-five percent is due to —for example, there are cases where a patient would find out that he had cancer and over-night lose all of his hair. There's many proven cases like that.

Q. And there's many causes that are unknown, isn't that correct? Without any history of any shock or anything, people's hair just starts falling out, yet no shock, no mental disturbance, or anything, and they have alopecia areata?

A. That is correct.

Q. And then it can go from alopecia areata to alopecia totalis to alopecia universalis—correct?

A. Correct.

Q. By that we mean it goes from, "areata," means an area. "Totalis" means a total hair, say in the scalp. "Universalis" would be the pubic hair, the hair of the body and just all over?

A. Correct.

Q. And that could be brought about by things other than shock, or emotional upset?

A. I wouldn't agree with that.

Q. Now, is it your testimony at this time, that the only [30] cause of alopecia areata is shock?

A. The major cause.

Q. But there are other causes, isn't that correct?

A. I said that we don't know about, that we can't prove one way or the other.

Q. I'm not asking you to tell me about the causes you don't know about.

Mr. Lanier: Your Honor, his testimony has been very clearly that the other causes are unknown.

(Testimony of Dr. Harry Levitt.)

Mr. Packard: This is cross examination.

Mr. Lanier: Well it may be.

The Court: I think he has not exceeded his rights on cross examination, Mr. Lanier. Proceed.

Q. (By Mr. Packard, resuming): Now, isn't it a fact, doctor, that a shock or excitement or nervous tension over a girl playing in a tournament, basketball, can cause certain tensions, mental strain, anxiety, which could cause this condition?

A. Possible.

Q. It's one of the causes, isn't that correct?

A. That's correct. [31]

Q. All right. Finish reading your entire record.

A. (Reading): She has three brothers, two older and one younger, and she says that she gets along well with here * * *. She said that she did well at school. Her past history was that she had measles and chicken pox and had never had scarlet fever. And then I read the physical examination before.

Q. Well, first of all you have "obese"——

A. Obese, that means she is somewhat overweight. And the other thing I left out, with the girl sitting here, that her right labia minora was larger than the left which I do not consider significant, and her clitoria was perfectly normal, which I do consider significant because, in some endocrinological disturbances——

Q. Well, now you're going a little too fast for me, doctor, and I'm sure you're probably going a little fast for some of the members of the jury, so since we've got time, let's take these step-by-step, so

(Testimony of Dr. Harry Levitt.)

you go ahead and read right from your record what your physical findings are and when you come to those medical terms, please give us the benefit, if you can, to interpret them into lay terms so we'll all understand you, doctor. [32]

Mr. Bradish: And would you be kind enough to spell the words for our good reporter because she is not a doctor.

A. (Continuing) The patient was over-weight; she was not demonstrative, that is, she was placid when I was questioning her. Her scalp hair was short, sparse and varied in color and texture. The hair did not break easily; the hair was well fixed in the scalp, and there was moderate scaling of the scalp. The eyebrows and eye-lashes were partially gone. The hair of her arm pits had been shaved and I was unable to make any definite idea of how much hair there was there. The hair of her pubic area—that is of the area between the legs—was short, in varied size, and there were plaques, that is areas of almost complete loss of hair. The right labia, that is in the vaginal area, about the vagina, one lip was larger than the other, which I did not think was significant. Her clitoris—and the clitoris is a small structure in the female which is, in development, what in the male develops into the penis—in her case was normal. The reason we examine that is if the gland is not working properly, for example, if she were having too much male gland, that would enlarge, and that could be involved in hair loss sometimes, and this was normal [33] in

(Testimony of Dr. Harry Levitt.)

this case. Then there was a red, bumpy area of both inner thighs. I don't have it on the record, but I did a Woods Light examination; I looked at her with a particular type of light which shows up ringworm, and that was negative, and I also took out several hairs and looked at them under the microscope and could find no evidence of fungus infection.

Q. Now, doctor, would you go to the board, and if you could, show a hair. Now when I say that, I have reference to the papilla——

A. You mean the hair in the scalp?

Q. Yes, and if you could, make it rather large. When I say that, doctor, make it where it comes down where the bud will be down in here some place (indicating).

(The witness left the witness stand and went to a blackboard in the court-room and by the use of green and red pencils sketched and demonstrated.)

Q. Now, maybe if I'd tell you what I would like for you to put in there—I see you have the gland in there. And you have the epidermis?

A. (Demonstrating) This is the epidermis up here.

Q. And the follicle is the——

A. This is the "dermis", and that's the hair, this is the papilla, and these are blood vessels which feed the roots. [34]

Q. And you have subcutaneous tissue below that, is that correct?

(Testimony of Dr. Harry Levitt.)

A. Well the dermis extends down—and this is subcutaneous tissue down here.

Q. Now the hair bulb is right down there by——

A. The papilla is the bulb. Do you want me to label that "bulb"? Papilla and bulb are synonymous.

Q. I believe that takes care of it. I'd like, your Honor, to have that marked Defendant's—I guess it would be "A"?

The Court: It will be so marked.

(Thereupon, the sketch was marked Defendant's Exhibit A for identification.)

Q. Now, doctor, what is the average life of a hair?

A. Oh, hair lives for a relatively long period, as you can tell because hair gets so long.

Q. Isn't it about two to four years?

A. Probably around four years.

Q. And so what happened then is when a hair gets to be about four years old they will come out—the papilla there—and a new one will start in the same area? A. In the same area. [35]

Q. Is that correct? A. That is correct.

Q. And, generally speaking, hair grows about, how much does it grow, you tell me?

A. It varies with the individual, but you can figure that hair will grow about as long as a fingernail in about four months.

Q. Now, where does the blood supply—first of all, there is no nerve or feeling in the hair, is there? A. Hair is a dead structure.

(Testimony of Dr. Harry Levitt.)

Q. And the only life to the hair comes down here at the bulb of the papilla, isn't that——

A. Well the papilla, of course, is living tissue.

Q. Yes, but I mean that isn't part of the hair?

A. The living part of the hair is down here in the bulb.

Q. When you say—down here in the follicle, this is all living tissue, but the red part here is dead, all the red part is dead tissue all the way up and, of course, there would be no feeling or no nerves or sensation in that, all of the red part? A. None.

Q. And the only life comes from the bulb itself which is fed through the blood vessels in the subcutaneous area below it?

A. That is correct. [36]

Q. Now what, generally speaking — has there such a measurement ever been made in the medical profession to determine the space between the average hair coming out of the scalp and the hair itself?

A. You mean the space in here (indicating)?

Q. Yes. A. Oh, it's very small.

Q. Would you say that practically none existed, isn't that correct?

A. No, because for electrolysis, it is possible to put a fine needle down into here (indicating). That's how we destroy hair with electrolysis, without entering the——

Q. But, for electrolysis, if you want to kill hair or deaden hair, you have to get down to the bulb there and kill the bulb?

A. We are able to insert a needle right along the side of the hair into here (indicating).

(Testimony of Dr. Harry Levitt.)

Q. And by doing that, that will deaden the bulb and the hair will come out and that's the end of that particular hair in that area? A. Right.

Q. Now, doctor, in connection with the — you may resume the stand there, doctor, thank you. (The witness resumed the witness stand.) In connection—you [37] stated you read the depositions of Dr. Martin, Melton and Michelson?

A. Yes, I did.

Q. And do you recall that it was on February 28th that Miss Nihill—Sandra—saw Dr. Martin and he diagnosed the condition as seborrheic dermatitis?

A. That is right.

Q. And you, through reading his deposition, and the history, that was the diagnosis he made of the condition existing at that time?

A. That is correct.

Q. And, according to his history, there is no evidence whatsoever of any chemical burns, was there?

A. That is correct.

Q. And there wasn't any history in anybody's deposition that there was any chemical burn?

A. No.

Q. And will you please explain what evidence you would expect to find from a chemical burn?

A. Well chemical burn would be just like, depending on the severity. A mild chemical burn would resemble a sunburn; a severe chemical burn would more resemble something like a piece of grease that had dropped on the hand or perhaps a hot iron to the hand, and——

Q. And you have experienced in your practice

(Testimony of Dr. Harry Levitt.)

[38] of dermatology—I don't know whether it's been asked, probably all the jurors understand——

A. Diseases of the skin?

Q. Yes, I wasn't sure whether that had been brought out. You have experienced in your practice in the field of dermatology many cases wherein people had sustained damages by various applications of solutions, tints, dies, cold wave cream, all sorts of cosmetics to their hair, is that correct?

A. Yes.

Q. And it doesn't matter what type of particular cosmetic—you've seen them from bleaches, you've seen them from tints, and you've seen them from cold waves and various solutions, is that correct?

A. That is correct.

Q. And in those cases, you have also had occasion to see people that had injury to their scalp from a chemical reaction to the scalp, is that correct? A. That is correct.

Q. But in this case, there is no indication of any chemical reaction to the scalp of Sandra, isn't that correct? A. That is correct.

Q. Now in these cases wherein these people had sustained damage to their hair, in your experience their hair [39] would break off and then would grow out at a normal rate, isn't that correct?

A. That is correct.

Q. And that occurred in all the cases you have seen where that type of damage has been sustained?

A. All but one.

Q. And this is the one?

(Testimony of Dr. Harry Levitt.)

A. No. I'm not referring to this one. We're forgetting about this one.

Q. But in any event, that's the normal thing you would expect, isn't that correct?

A. That is correct.

Q. And that is true even so far as chemical burning to the scalp is concerned, you would not expect damage to the bud itself, but you would expect the burning to the scalp, maybe take the hair right down to the scalp and then you would expect the hair to re-grow?

A. Except where the burn would be severe enough to destroy subcutaneous tissue.

Q. But you don't see those in hair tints or——

A. No.

Q. I mean, we're talking about a strong acid dropped on someone's head, or from working in a chemical works or something, where you have a real strong chemical burn? [40]

A. Ordinary cosmetic preparations would never do that.

Q. In other words, would never damage the subcutaneous areas? A. That is correct.

Q. And as a matter of fact, in your practice, you've never seen any subcutaneous area damaged by the use of cosmetics, have you?

A. That is correct.

Q. When you say it's correct—you mean my statement? A. Your statement is correct.

Q. Now, you will recall that Dr. Michelson, I

(Testimony of Dr. Harry Levitt.)

believe, and he is recognized as one of the leading dermatologists in this country, isn't he?

A. Yes.

Q. And he examined Sandra, I believe in Minneapolis, in March as I recall, in 1956?

A. About a year ago.

Q. And Dr. Michelson stated, I believe, that the scalp was impervious to solution. What does he mean by that? A. I'm not sure.

Q. Well, what does the word "impervious" mean?

A. That no solution could go through.

Q. When he says that the scalp is impervious to solution, he means that the solution can not go down below the [41] scalp or the hair. That was his opinion, wasn't it?

A. I think he meant that it could not be absorbed by the body through the scalp.

Q. Now, going back to the first treatment, the seborrheic dermatitis which was diagnosed by Dr. Martin, was a condition in which he prescribed selsum, and that was a prescription given for the purpose of probably curing this dandruff—we call it dandruff, is that correct? A. Yes.

Q. What causes seborrheic dermatitis?

A. Seborrhea has a number of causative factors. Dietary factors play a part, hereditary factors play a part, glandular factors play a part—and emotional factors play a part.

The Court: Would you have the doctor define seborrheic dermatitis again please? I think he did.

(Testimony of Dr. Harry Levitt.)

A. Seborrheic dermatitis is what is commonly known as dandruff. It may vary from slight scaley to severe redness and scaley, and it may involve not only the scalp, but other portions of the body.

Q. Now you had cases where you quite often find seborrheic dermatitis in teen-agers, don't you? [42] You see some of them that have lesions or acne because of the sweat gland—the oils pouring out, is that correct?

A. Well, actually, it's faulty action of the fat glands.

Q. Faulty action of the fat glands will cause this deposit on the scalp, which is referred to as seborrheic dermatitis, that's one of the causes, isn't it?

A. Yes.

Q. And then also a cause can be a systemic condition—and when I say "systemic condition," that refers to the condition within a person's body, their own chemical make-up, and composition. Is that correct, sir?

A. The glands and the diet.

Q. And one of the glands which has effect upon this is the thyroid. Is that correct?

A. That is correct.

Q. Now do you recall, Dr. Levitt, that Dr. Melton prescribed thyroid to this young lady when he examined her in the summer of 1955, did you get that history? A. Yes.

Q. Now, the purpose of prescribing thyroid, and that is a thyroid substance, isn't it, that's the name of it, thyroid substance to supplant the thyroid

(Testimony of Dr. Harry Levitt.)

gland, is that correct? A. That's correct. [43]

Q. And that, I take it, is to stabilize the metabolism within the body? A. Reasonable.

Q. And you take a thyroid condition, and you've seen people suffering from thyroid conditions, haven't you? A. Yes, I have.

Q. Will you please state to the jury some of the outward manifestations that you would ordinarily expect to find in a person suffering from a thyroid condition?

A. You mean not enough or too much thyroid?

Q. Well, if we're taking pills we haven't got enough, is that correct? A. That's right.

Q. O. K.

A. There is usually an increase in weight; the patient may become lethargic, the skin becomes thickened and dry, the hair becomes thickened and dry and there may be a certain amount of hair loss with a severe lack of thyroid function.

Q. Now actually, doctor, that's just about a classic picture of what you have here of Sandra, isn't it? She's over-weight, her hair is falling; that she has a drying of the skin, and when I say a drying of the skin, you did find it drying in her thighs, isn't that correct? [44]

A. Well that was because she is rather obese——

Mr. Lanier: One moment, if the Court please. Now this question is objected to, if the Court please, because it's completely outside the testimony, because the record conclusively shows that the first thyroid——

Mr. Packard: Well, now——

(Testimony of Dr. Harry Levitt.)

Mr. Lanier: Wait a minute, counsel.

Mr. Packard: This is cross examination.

The Court: Let him finish.

Mr. Lanier: He is misquoting testimony, your Honor, because it clearly shows that the first thyroid that was ever given to Sandra was given thirteen months after the application when she was already totally bald.

The Court: All right. You can bring that out on your redirect. Proceed.

Mr. Packard: All right. Will you please read my question back?

The Reporter: (Reading question) "Now actually, doctor, that's just about a classic [45] picture of what you have here of Sandra, isn't it? She's overweight, her hair is falling; that she has a drying of the skin, and when I say a drying of the skin, you did find it drying in her thighs, isn't that correct?"

Mr. Packard: Would you go back please and read the answer that Dr. Levitt gave to my question? The one before that? I lost my train of thought.

The Court: The reporter will require a little time. The Court will recess and the jury will retire for ten minutes. Be back please and ready to proceed.

(Whereupon, a ten minute recess was taken, and thereafter occurred the following proceedings in open Court:)

Q. (Mr. Packard resuming cross examination of

(Testimony of Dr. Harry Levitt.)

Dr. Levitt): Now Dr. Levitt, did you observe that Sandra's skin was dry in the elbow area and various portions of her body had dry skin?

A. Somewhat dry.

Q. And also this area in the scalp there would be some dryness, is that correct?

A. That is correct.

Q. Well it can be either from a dryness or an over-supply [46] of the subcutaneous gland, isn't that correct? Do you follow me, doctor? Well, maybe I'm—well when you have dandruff or seborrhea, it results from the pouring forth of the oil from the subcutaneous gland, which you put here on the board. Is that a correct statement?

A. Not entirely; sometimes either faulty fat being deposited or not enough oil being expressed either, it could be either one that could produce a dryness.

Q. Well, anyway, it's a scaley formation on the scalp, is that correct? A. That's correct.

Q. And that, generally, is referred to as a dry condition, is that correct, generally speaking?

A. We usually call it dandruff.

Q. I want to go back now. You stated that with a thyroid deficiency, you usually find an increase in weight. Now you did find an increase in weight here?

A. An increase of weight is usually a particular type with a so-called myxedema, in which you get a particular type of swelling, particularly to the legs and of the face, with an unpitting edema, that

(Testimony of Dr. Harry Levitt.)

is you poke your finger in it and it doesn't depress, and she did not have that type of weight. [47]

Q. But she was obese? A. She was obese.

Q. Did you take a history as to her weight, say over a period of years to determine when this increase had occurred?

A. I don't believe I did.

Q. And one of the symptoms you expect to find in a thyroid deficiency is that the skin becomes thick and dry? A. Among other symptoms.

Q. And that the hair becomes thick and dry?

A. The hair usually becomes lighter in texture rather than heavier in texture, and usually becomes sparse, of a particular type of loss.

Q. When I say hair becomes thick, maybe we misunderstood each other, I am talking about the hair shaft itself. Do you follow what I mean?

A. The hair shaft will frequently become thinner in thyroid disease.

Q. And the hair shaft can vary in size, isn't that correct? A. That is correct.

Q. That's the way these various home wave solutions work upon the hair shaft, is that they take and soften it where it gets larger and then they put some substance [48] on it—neutralizer——

A. They reduce the chemical linkage.

Q. That's what I mean, in the hair shaft itself. All right now, in the thyroid deficiency you would expect to find a loss of hair too, quite often, that's one of the symptoms?

A. In severe thyroid diseases.

(Testimony of Dr. Harry Levitt.)

Q. Well, now there are various—you can have a thyroid deficiency without having all of the findings you would expect to find in certain thyroid conditions?

A. They usually follow in certain order. For example, the menstrual period usually ceases before you get much else.

Q. Well now I took your answer from the reporter, when I asked you what you would expect to find in the usual thyroid deficiency, and in the order you gave, and your answer was "Usually an increase in weight; the patient may become lethargic, the skin becomes thickened and dry, the hair becomes thickened and dry and there may be a certain amount of hair loss with a severe lack of thyroid function." That was your answer. Now isn't it a fact, doctor, that those symptoms are symptoms which were present in Sandra's condition?

A. Not of the type that you get with hypo [49] thyroid diseases.

Q. But you did find from the history that you took, and from the information you obtained in connection with this condition which she was suffering from, that Dr. Melton had prescribed thyroid? A. That is correct.

Q. That's correct. And with the symptoms present here, according to good medical practice and standards, the prescribing of thyroid was indicated?

A. Thyroid we use empirically, that is for no good reason, in almost any hair loss when we treat it.

(Testimony of Dr. Harry Levitt.)

Q. Is it your testimony Dr. Melton used it for no reason?

A. No, I believe that he thought that it might be of some benefit.

Q. And isn't it a fact that it might have been of some benefit, with the falling of hair, the dryness of the skin, the increase in weight, and so forth, that that was one of the things the attending physician was bound to consider and rule out before he went to something else? Isn't that correct?

A. Well, as a matter of fact, as I told you when we read the history, when I talked to the girl I couldn't get a history of a blood iodine test or a basil metabolism test, but after the mother came into the room I discussed that with her and a blood iodine had [50] been done and apparently was normal. I did ask that question.

Q. All right, now let's go back, did you find out about a basil metabolism?

A. A blood iodine test and a basil metabolism test give you the same information.

Q. What did you find out about the——

A. They were normal.

Q. And you received that information from the mother?

A. From the mother when I saw her on the day she was in the office.

Q. Now, wasn't there a metabolism test run by Dr. Melton? He said the laboratory studies were normal. Is that where you read that?

A. That's right.

(Testimony of Dr. Harry Levitt.)

Mr. Lanier: Page 6 counsel, the fourth line. "Radioactive iodine test was normal."

The Witness: That is a test that gives you more accurate information than the actual basil metabolism test.

Q. (Mr. Packard, resuming): But he did prescribe thyroid after obtaining those laboratory reports—— A. Yes.

Q. And from his opinion at that time, it was indicated, as far as you know? [51]

A. But using an entirely different dosage of thyroid if you were treating something like hyperthyroidism.

Q. All right. Now, doctor, I believe you stated in your direct examination, that the plaintiff was suffering, in your opinion, from alopecia areata. Was that your testimony?

A. That is my testimony.

Q. Now, alopecia areata, isn't that the loss of hair in patches or spots?

A. It may vary from a tiny one-half inch patch to complete loss.

Q. Now did you find—where did you find these patches on Sandra's head?

A. Her scalp has no patchiness. Her scalp has little patchiness anyway.

Q. Well, generally speaking doctor, her scalp doesn't have patches of loss of hair, does it?

A. She has the type of hair loss consistent with partially regrowing alopecia areata.

Q. Now when you say "alopecia areata," you're

(Testimony of Dr. Harry Levitt.)

really basing your testimony more upon the picture than what you saw in your office. Isn't that correct, doctor? A. No, sir.

Q. Of course, the patches in the pubic area would indicate alocepia areata? [52]

A. And the eyebrows and the eye lashes.

Q. I see. And you read in the history of these doctors, that there's a complete loss of the eye lashes. You read that, is that correct?

A. That is correct.

Q. And the eye lashes though have grown?

A. Slightly. There is some regrowth.

Q. How about the eyebrows?

A. A slight amount of regrowth.

Q. But, generally speaking, when you refer to medical profession's alopecia areata, you see people with their hair with spots here and here and here (indicating), with a full normal growth of hair, and then you can see right down smooth on the scalp, that's the classic case of alopecia areata, isn't it? Is that correct?

A. That is the text book picture.

Q. Well, that's right; I looked at the text book. You're familiar with Sutton, aren't you?

A. I am.

Q. It's one of the leading authorities on dermatology. Is that correct? A. He is one of them.

Q. He is one of the authorities, he's recognized, isn't that correct? A. Yes. [53]

Q. These books all have pictures of alopecia areata in them, and one of the classic pictures they

(Testimony of Dr. Harry Levitt.)

show is someone with a normal full growth of hair and just a bald spot about a diameter of an inch or two inches, now that's the classical picture?

A. That's a classical picture, yes.

Q. But she has hair disbursed all over her head at the present time, isn't that correct?

A. Her's is consistent with the so-called alopecia totalis of the scalp.

Q. Well then is it your testimony she doesn't have alopecia areata, but it's alopecia totalis?

A. Alopecia areata and alopecia totalis are synonymous, only indicating amount of degree and, partially, location.

Q. And it may go into alopecia universalis?

A. They switch back and forth sometimes.

Q. And that was the finding which Dr. Melton arrived at. Is that correct?

A. Yes. I don't believe that Dr. Melton thought it was alopecia areata.

Q. Well he said alopecia of unknown etiology, as I recall. Is that correct?

A. That is correct. I am not even sure that he made that diagnosis. I don't remember the exact diagnosis. [54]

Q. Well, anyway, I am not concerned about that. We have his testimony and I want your opinion, and I think you have stated it, doctor. Now, was this test a protein iodine test?

A. The correct name is "protein-bound iodine test."

(Testimony of Dr. Harry Levitt.)

Q. And that does not rule out the possibility of a thyroid state, does it? A. It does.

Q. Can't you take clinical findings of a girl overweight, as being an indication of thyroid?

A. No.

Q. Now, you read the deposition, I believe you stated, of Dr. Henry Michelson? A. I did.

Q. And do you recall what his diagnosis was?

A. Alopecia areata.

Q. Well if I were to tell you that his diagnosis was fragilitis crinium and seborrheic dermatitis, with another condition that must be considered as alopecia areata, would that refresh your recollection?

A. The other term was mentioned, but I didn't see it discussed particularly.

Q. And the "other term," I'm referring to now, and I believe you're referring to, Doctor——

A. Fragilitis crinium. [55]

Q. Yes. All right, now will you state to the jury what fragilitis crinium is?

A. Fragilitis crinium is a condition in which the hair has become brittle and fragile and tend to separate and split.

Q. And what are the causes of fragilitis crinium?

A. Well the classical fragilitis crinium, theoretically has no cause, but a number of things could produce a similar picture, such as chemical applications of any kind, hair solutions of almost any kind could produce a very similar picture.

(Testimony of Dr. Harry Levitt.)

Q. But you would expect to get a normal regrowth, isn't that correct? A. Yes.

Q. But, when I say "fragilitis crinium"—where it's breaking off—but if it persists over a couple of years, then you would rule out that as being the cause if you were treating, or made a diagnosis of fragilitis crinium. Is that correct?

A. That is correct. Just a moment. As I remember, I just got a picture of the last statement I read there of Dr. Michelson, and towards the end there he does say that he discussed the situation with his associate, and they came to the conclusion that this was alopecia areata. I believe if you will read his testimony [56] toward the end you will find that.

Q. All right. But in any event you have seen cases of fragilitis crinium. Is that correct?

A. Not that I've been convinced is the so-called text book picture.

Q. And the text books do discuss this particular condition as being one of the causes for breaking of the hair. Is that correct?

A. Yes, and most feel that it's probably part of another condition and doubt its very existence as a condition per se.

Q. But it is manifest by the splitting and breaking of the shaft of the hair?

A. That is correct.

Q. And the shaft of the hair is the red part of the hair after it becomes——

A. After it's dead.

(Testimony of Dr. Harry Levitt.)

Q. What? A. After it's dead.

Q. Well it splits and regrows though, doesn't it? From the bud?

A. Well, it keeps growing abnormally and as the hair comes out, it's a hair that is not a normal hair; it's a hair that's a little more brittle than usual and it [57] splits as it grows out.

Q. That's right, but what I'm getting at, assuming for the purpose of this discussion, doctor, that we have a condition of fragilitis crinium—that this red will come out, it will not be a normal, nor break off or drop off, but this blood supply—there's still blood supply, and the bulb is still alive. Isn't that correct? A. Oh yes.

Q. And then you get another one coming up and it's discontinued and the hair just keeps pouring out, isn't that correct? A. That is correct.

Q. Does the medical profession have any particular medication that's prescribed for that condition?

A. None that's probably very effective except that if there is seborrhea present we clear that up and hunt for any possible internal causes, such as anemia or diabetes and clear up those conditions if they are present.

Q. Well, and also a thyroid condition?

A. If that's present, yes.

Q. In other words, a hyperendo—how do you pronounce that?

A. It's an endochrine-hypo function. [58]

Q. And that is a systemic condition within the

(Testimony of Dr. Harry Levitt.)

person's own body, the chemical which causes that condition? A. That is right.

Q. And I take it that, in your practice, that you have seen people, and cases, where people have alopecia areata where, under proper management and treatment, they have a normal regrowth of hair?

A. A lot of mine are not successes. Some do not grow back.

Q. Some of them do not, but when you have someone come into you that has alopecia areata you don't say "well, I'm sorry, we can't get your hair back," but you feel in a good percentage of those cases, you can treat them successfully?

A. I tell them most will grow back.

Q. You think in most cases of alopecia areata that you'll get a regrowth of hair?

A. That is correct.

Q. And that is true of fragilitis crinium, is that correct? A. That is correct.

Q. But when people are suffering from these conditions you undertake to prescribe for them and give them certain treatment which will take care of whatever deficiency, or whatever is causing it—get to the [59] cause and then treat that cause. Is that correct?

A. If there is a cause. The average text books, which discuss the treatment of alopecia areata, state that they do not believe there is any good treatment except referral to a psychiatrist.

Q. Now, the text books though—most of them—

(Testimony of Dr. Harry Levitt.)

feel that you should normally get a regrowth of hair. Isn't that correct?

A. The prognosis varies with the age of the patient and the amount of loss. The younger the patient is and the more loss there is, the poorer the prognosis there is.

Q. But the text books, generally speaking, normally expect you to get a regrowth. Isn't that correct? A. In most cases.

Q. And you do get, in seborrheic dermatitis, loss of hair from seborrheic dermatitis, a certain amount of cases?

A. There's a difference of opinion on that; most of us at the present time feel that seborrhea and hair loss are more coincidental than causative.

Q. Well, you do recognize, in the medical profession, a lot of things occur coincidental. Isn't that correct, doctor? A. That is correct. [60]

Q. And "coincidental" means that it just happens that both things happen at the same time, is that correct? A. That is correct.

Mr. Packard: That's all the questions I have.

Further Cross Examination

The Court: I'll ask counsel please, in accordance with the understanding we had yesterday, you try not to repeat what has been developed by your co-counsel.

Mr. Bradish: I will do my best, your Honor.

The Court: I won't say co-counsel, I'll say associate counsel.

(Testimony of Dr. Harry Levitt.)

Q. (By Mr. Bradish): Doctor, if I understood your testimony correctly, you described alopecia areata as a loss of hair which usually occurs quite suddenly? A. That is correct.

Q. Now, you gave us an opinion here, doctor, that you said a cold wave permanent could have caused the loss of hair in this young girl's case. Is that right? A. Yes. [61]

Q. Are we to assume from that, that there also could have been many other causes of the loss of her hair?

A. Not that I could gather from the history or reading the other transcripts.

Q. Well, doctor, you found, in your examination of her, that there was a condition of alopecia areata in the pubic area. Did you not? A. Yes.

Q. And, from the history that you had and from reading the depositions of the treating doctors, you found that that condition of a sparsity of hair in the pubic area existed at the same time that she had the loss of hair in the scalp. Did you not?

Mr. Lanier: Objected to, if the Court please, as a mis-statement again of the testimony. There is no such examination found until the first time in six months after the original loss of hair.

Mr. Bradish: Your Honor, I asked this doctor if he found that from his examination of the depositions.

The Court: He may answer.

A. At what time of the period?

(Testimony of Dr. Harry Levitt.)

Q. At the time she went to Dr. Martin—and in [62] his examination—in his deposition—did you determine that there was a condition of loss of hair, as diagnosed by them, in the pubic area at that time? A. No.

Q. When is it doctor that you first learned, from the history or the depositions of these other doctors, that this girl first noticed any loss of hair in the pubic area?

A. When Dr. Melton examined her.

Q. When Dr. Melton——

A. That was the dermatologist.

Q. I see. As a matter of fact, there is no indication in the report of Dr. Martin that he ever examined the pubic area at all, is there?

A. I saw no such record, but the girl was also thirteen at that time, which could have made a difference.

Q. You didn't have any history of the application of any chemical or cold wave solution in the pubic area, did you? A. No, I did not.

Q. Now, you mentioned that chemical could be anything, including water. Is that right?

A. That's right.

Q. It's correct, is it not, that certain soaps and shampoos and things contain some chemicals?

A. That is right. [63]

Q. And did you have a history from this young lady that a shampoo was applied to her hair at the time, or just before the application of this cold wave solution?

(Testimony of Dr. Harry Levitt.)

A. My history was that there was no shampoo.

Q. Well, doctor,——

The Court: Let's be sure we understand each other—before the application or after.

The Witness: After. I have no history of any shampoo afterwards.

Q. (Mr. Bradish, continuing): Do you have any history of any shampoo before? A. No.

Q. Well, doctor, if you were told that there has been testimony that the hair was shampooed on the same day as the application of the cold wave solution, and in accordance with your testimony that shampoo contains certain chemicals, would your opinion that the hair loss could have been caused by the cold wave be changed in any manner?

A. No.

Q. Well, isn't it possible, doctor, that the hair loss, if it was caused by the application of the chemical, could also have been caused by the chemical in the shampoo? [64]

A. In my experience, I have never seen any hair loss caused by shampoo.

Q. They do contain chemicals though, don't they? A. Yes.

Q. Now, I believe you said that emotional tension is the only known cause of alopecia areata.

A. That is correct.

Q. There are no other known causes, but you suspect certain other things?

A. It depends on the doctor. Personally, I believe it will prove to be the only cause of alopecia

(Testimony of Dr. Harry Levitt.)

areata. There are other people who believe that there may be other causes.

Q. Well, doctor, your diagnosis is that this young girl's condition is one of alopecia areata?

A. That is correct.

Q. And you state that emotional tension is the only known cause of alopecia areata?

A. That is correct.

Q. And that is the reason, is it not doctor, that when you dermatologists discover this condition of alopecia areata, the treatment indicated to you is generally treatment by a psychiatrist?

A. Well most of us don't send the patient to a psychiatrist, but it's advisable. [65]

Q. Well, it's advisable for this reason, is it not, doctor, that when you remove the emotional instability, you generally get a good result insofar as the alopecia areata is concerned?

A. Generally not, but at least the patient becomes able to live with this condition.

Q. Well, I thought you told Mr. Packard, that in a great many cases of alopecia areata, that the patient recovers almost a full growth of hair?

A. Most recover.

Q. Now, if this young lady had come to you in the Summer of 1955 and gave you a history of this condition, and you diagnosed it as alopecia areata at that time, would you have prescribed a course of treatment for her at that time?

A. I would have given her a shampoo or a lotion and if the family seemed particularly con-

(Testimony of Dr. Harry Levitt.)

cerned, I might have seen her in the office at intervals for—to keep them—realize that we were watching the condition. I don't think I would have given —some people give ultraviolet light, which I don't think does any good, but we give it sometimes because we are forced into it, because the patient demands we do something about this. But I don't think that it does any particular good.

Q. Well, do you think, doctor, that in the summer of 1955, [66] when this young girl's condition of alopecia areata was diagnosed, that there was no treatment that could have been given to her at that time that could have helped her condition?

A. I do not believe so.

Q. You don't believe so? A. I do not.

Mr. Bradish: That's all I have. Thank you.

Mr. Lanier: Just one or two questions, doctor.

Redirect Examination

Q. (By Mr. Lanier): There have been some considerable questions directed at you, doctor, with the obvious intention of inferring that this loss of hair condition is due to a thyroid condition in Sandra Nihill. Now, first of all, may I ask you, from your examination of this girl, from your training, observation and experience, from your reading of the case history—familiarization of the case history —do you have a medical opinion, based upon reasonable medical certainty, as to whether or not this girl is suffering from a thyroid condition? [67]

A. I do not believe she has a thyroid condition.

(Testimony of Dr. Harry Levitt.)

Q. Now, doctor, also, for the benefit of the jury, would you tell the jury why you say she has not?

Mr. Packard: I object to the form of the question because the doctor didn't say she did not have one. He said "I do not believe," I object to the form of the question, it's leading and——

Mr. Lanier: I'll reframe it, your Honor.

Q. (Mr. Lanier, resuming): Will you state the things upon which you base your opinion?

A. I don't think that she has a thyroid condition, because her weight gain or obesity is not the type usually associated with hyperthyroidism, her type of hair loss is not the type that one sees with hyperthyroidism, her protein-bound iodine test was normal, and her menstrual periods had remained basically unchanged. Usually the menstrual periods change with a hyperthyroid condition.

Q. With all of those factors being present in your opinion, doctor, is it possible for her to have a hyperthyroid condition? A. No.

Q. I believe, doctor, you also stated on cross-examination, [68] that the administration of thyroid was a standard treatment where there are loss of hair cases? A. That is correct.

Q. In looking for some possible help?

A. That's right. More or less of a tonic.

Q. I believe you also stated that in this type of case, the younger the patient, the less likelihood of regrowth? A. That is correct.

Q. Now, doctor, there has been some questions asked you also on the relative loss of hair and also

(Testimony of Dr. Harry Levitt.)

in the areas lost. Does the fact that the deposition of Dr. Martin, taken immediately and during the loss of hair, at no point discloses any loss of eyebrows or eye lashes, does that have any significance to you? A. Yes, it does.

Q. And what is the significance?

A. If, on his first examination, he did make a note of alopecia areata, or that a spotty loss of the eyebrows and eye lashes—and at thirteen, I suppose it would have been hard to judge the groin—the possibility of these two events being associated, that is I would have felt that the alopecia areata had started without regard, with no effect by the cold wave permanent at all. [69]

Q. But the fact that there is no loss of eyebrows, or testimony of loss of eyebrows or eye lashes, or pubic hair at that time, what does that lead you to?

A. Well, that leads to the assumption that the patient became upset——

Mr. Packard: Just a moment. Pardon me for interrupting. I wish to object to the question upon the ground it's assuming facts not in evidence. There isn't one iota of evidence in here that Dr. Martin examined the pubic area.

Mr. Lanier: Eliminate the pubic area in the question, doctor.

Mr. Packard: Well, there is no evidence of reference to the eyebrows or eye lashes on his examination.

The Court: As I recall——

(Testimony of Dr. Harry Levitt.)

Mr. Packard: He just looked at her hair and said she had seborrheic dermatitis, and that was it.

The Court: As I recall it, Dr. Martin said nothing about the eyebrows.

Mr. Lanier: That's exactly true, and in his case history, [70] your Honor, he only shows hair loss. His case history does not show any eyebrow loss and does not show any eye-lid loss.

The Court: It doesn't show any examination of the eyebrows.

Mr. Lanier: It would be impossible, your Honor, to examine a patient's head without also seeing and examining eyebrows and eye lashes.

Mr. Packard: Well, now——

The Court: Sustain the objection.

Q. (By Mr. Lanier): All right. Now, doctor, is there any significance to you in the examination of Dr. Melton six months later, when Dr. Melton testified "sparseness" as to the pubic area, but refers to no patchiness of the pubic area, in this thirteen year old girl—does that have any significance.

A. Again, the girl is young and the girl is developing. At this time, I don't think there is any clinical question of alopecia areata in the pubic area. Possibly when the girl was three years younger and hair doesn't develop until later, it might have been difficult to make up one's mind.

The Court: Three years younger than when, doctor?

The Witness: Than at the present time.

(Testimony of Dr. Harry Levitt.)

Q. (Mr. Lanier, resuming): Now, doctor, if the testimony should show that, as a matter of fact, there was no loss of eyebrows for the first three to four months after and during the loss of hair, would that have any significance to you?

A. It would.

Q. And would that be the significance that you are talking about by the original start of a chemical reaction developing into alopecia?

A. That is correct. Not developing in, it would be followed by.

Q. Being followed by. And you have also stated, doctor, that your reason in one of this type of cases for recommending a psychiatrist is for the purpose that the patient might learn to live with her condition? A. That is right.

Mr. Lanier: Thank you.

Recross Examination

Q. (By Mr. Packard): Doctor, now insofar as the loss of the eyebrows and [72] eye lashes is concerned, in alopecia areata, it's recognized in the medical profession that the loss of hair spreads from certain parts of the body to certain other parts of the body, isn't that correct?

A. Or it may happen all at the same time.

Q. I mean you may have a loss of a patch on the back of your head here and then you may have a loss in the pubic area and then your eye lashes will progressively follow along over a period of months or years?

(Testimony of Dr. Harry Levitt.)

A. But healing sometimes, and a new patch comes out sometimes.

Q. That's what I'm getting at. So, a person very well could have alopecia areata without their eyebrows falling out right away, or their eye lashes, isn't that correct? A. That is correct.

Q. And that's why apparently they call these conditions, they go from "areata" to "totalis" to "universalis" because that's the spreading, or it's getting more and more loss of hair?

A. That is correct.

Q. And insofar as the clinical findings—and I say that insofar as sensitivity, irritation, so forth—there is no evidence through any of the histories here that there was any chemical reaction to the scalp or the skin from any application? [73]

A. In the average reaction to cold wave solution, unless there has been spilling to the scalp, the scalp is not involved.

Q. Well there wasn't any evidence in this case that the scalp was involved in any manner from a chemical reaction, was there?

A. Except in the first examination of Dr. Martin, who discussed the scalp was slightly red and scaley. Other than that I could find no evidence at all.

Q. That's right, that's the only evidence, but assuming that the plaintiff, herself, stated that there was no burning sensation at the time of the application, after the application then you wouldn't ex-

(Testimony of Dr. Harry Levitt.)

pect there would be any chemical reaction, isn't that correct?

A. Depending on the severity.

Q. But ordinarily if there is a severe chemical reaction, the patient would get a stinging sensation, isn't that correct?

A. If the solution is on the scalp.

Q. That's what I mean.

Mr. Packard: Thank you.

Mr. Bradish: No questions.

Mr. Lanier: No further questions, your Honor.

(Witness excused.) [74]

The Court: It's now twelve o'clock. I suppose we will recess until two p.m. You may separate and go your separate ways, don't talk to each other or anybody else about the evidence in this case until you've heard all of the case, and don't permit anybody to talk to you about it. Be back ready for further procedure at two p.m.

(Whereupon, at 12:00 o'clock noon, the hearing was adjourned until 2:00 o'clock p.m.) [75]

Afternoon Session

Whereupon, at 2:05 o'clock p.m., April 10, 1958, the hearing in the within cause was resumed pursuant to the noon recess heretofore taken, and the following proceedings were had in open Court:

The Court: Did you conclude with the witness?

Mr. Lanier: We just finished the medical with Dr. Levitt, your Honor.

The Court: Call your next witness.

Mr. Lanier: May it please the Court, I would like at this time, to call Mrs. John Nihill.

Whereupon,

MRS. JOHN W. NIHILL

called as a witness on behalf of the plaintiff, after being first duly sworn by the clerk, in answer to questions propounded, testified as follows, to-wit:

The Clerk: What is your name?

The Witness: Mrs. John W. Nihill. [76]

The Clerk: Thank you.

Direct Examination

Mr. Lanier: Mrs. Nihill, every one has to hear your testimony, so will you try to speak right up so they can hear it.

Q. (By Mr. Lanier): Would you state your full name, please? A. Mrs. John W. Nihill.

Q. Where do you live, Mrs. Nihill?

A. Four and a half miles northeast of Kensal.

Q. In North Dakota? A. Yes, sir.

Q. And Sandra Nihill is your daughter?

A. Yes, sir.

Q. And where is your husband, Mr. Nihill, now?

A. At Kensal, North Dakota, trying to put the crop in.

Q. Calling your attention to the years prior to February 5, 1955, and that is before Sandra had the incident about which this lawsuit is, would you tell me generally the condition of her health?

A. Sandra has always been a very healthy girl.

Q. Did she have any difficulties at all with her skin? A. No.

(Testimony of Mrs. John W. Nihill.)

Q. Her scalp? A. No.

Q. Or her hair? A. No. [77]

Q. Prior to February 5, 1955—before February 5, 1955? A. No, no.

Q. Now, calling your attention to February 5, 1955, did you or not have occasion to go into Kensal to the Rexall Drug Store for a purchase?

A. I did.

Q. And who went with you? A. Sandra.

Q. When you went in, what was it that Sandra wanted?

A. We went in there with the sole purpose of buying a Cara Nome pin curl home permanent.

Q. And who actually purchased it?

A. I did.

Q. How old was Sandra at the time?

A. Thirteen years old.

Q. You actually made the selection?

A. Yes, sir.

Q. Why did you select Rexall Cara Nome?

A. I have known the Rexall Drug Stores, well as long as I can practically remember, and I have known Cara Nome products and I have always felt that they were safe and reliable.

Q. Do you keep and subscribe to the Farm Journal in your home? A. Yes, sir. [78]

Q. Have you seen the ads of the Rexall, including Cara Nome pin curl waves, in those?

A. Yes, sir.

Q. Have you checked, for instance, what they have said?

(Testimony of Mrs. John W. Nihill.)

A. Well they usually advertised and I believe down at the bottom of the page it always says "The Rexall Drug Company stands behind all of its products" or something like that.

Mr. Packard: I object to this evidence on the ground that it's hearsay. The best evidence is the ads, what they say themselves, not what this witness believes they say.

Mr. Lanier: She can testify to what she has read, your Honor.

The Court: I rather think so yes. If you connect it up by bringing some advertising.

Mr. Lanier: The advertising is already in, your Honor.

The Court: Very well.

Q. (Mr. Lanier, resuming): Did you read those ads? Prior to February 5, 1955?

A. Oh, yes, I saw the Cara Nome home permanent maybe advertised for about two years.

Q. Did you or not rely upon the advertising?

A. I did. [79]

Q. Is that or not the reason you purchased Rexall Cara Nome? A. Yes, sir.

Q. Now, calling your attention to that particular date, Mrs. Nihill—Mrs. Nihill, I show you Plaintiff's Exhibit 7, and ask you whether or not you have seen that exhibit before? A. Yes, sir.

Q. And where did you first see it?

A. In the Kensal Rexall Drug Store.

Q. And where was it then?

(Testimony of Mrs. John W. Nihill.)

A. It was on the counter, he had a pile of them with his display of Cara Nome home pin curl.

Q. And what did you do with it?

A. Well I picked one up and took it home with me.

Q. And are you the person that gave Exhibit 7 to me? A. Yes, I am.

Q. All right. Now, Mrs. Nihill, I also show you plaintiff's Exhibit 28. Will you tell me where you first saw that exhibit?

A. This was in the Cara Nome permanent kit.

Q. That you purchased? A. Yes, sir.

Q. Thank you. [80]

The Court: Is that Exhibit 14, Mr. Lanier?

Mr. Lanier: One was 7, your Honor, and the other 28. The large one is 7 and the small green one is 28.

Q. (Mr. Lanier, resuming): Who paid for the kit? A. I did.

Q. Did you take it home? A. Yes, sir.

Q. When was the permanent wave itself actually applied? A. That same evening.

Q. And who, basically, applied it?

A. My neighbor, Mrs. Adaline Briss.

Q. Is Mrs. Briss the same one that's also Mrs. Jorgenson? A. She is.

Q. And were you present during the application? A. Yes, sir.

Q. Were you present when the kit was first taken apart? A. Yes, sir.

Q. Now will you tell us, inasmuch as you your-

(Testimony of Mrs. John W. Nihill.)

self can remember, what was done and what steps were taken during the permanent?

A. Well first of all you get your little dishes——

Q. I don't want to know what you get, I want to know what you saw and what you did?

A. First of all I got the dishes ready, two little [81] dishes, a towel, a quart jar and I guess that was it.

Q. All right. Now what did Sandra do?

A. Well at the beginning she didn't do anything but just sit around, but then Mrs. Briss read the directions——

Q. Now prior to that had Sandra shampooed her hair or not?

A. Oh, yes, Sandra had shampooed her hair, yes.

Q. Do you know about how long before that?

A. Well I couldn't exactly say how long, but——

Q. At least that was completed?

A. Yes, it was.

Q. All right. Now what did you do?

A. You mean when we started to give the permanent?

Q. When you started.

A. Well after we had gathered these things together why we—well, see, first Mrs. Briss opened the kit, then she read the directions and then she read them aloud and Sandra read them and I read them.

Q. You all three read them? A. Yes, sir.

Q. Did you become thoroughly familiar with them? A. Yes, sir.

(Testimony of Mrs. John W. Nihill.)

Q. All right. Now what was done?

A. Sandra—I gave her a chair and had her sit down and we put the towel around her shoulders and the bottle of the pin curl solution was opened.

Q. By whom? A. Mrs. Briss.

Q. Was it a sealed bottle? A. Yes it was.

Q. Did you see her open it? A. Yes, sir.

Q. Did you see her break the seal?

A. Yes, sir.

Q. All right. What did you do next?

A. Half of that was poured into the dish, and the other half was left in the bottle and the seal was put on.

Q. Was that the pin curl lotion?

A. That is the pin curl lotion.

Q. And you put half of it in the dish?

A. Yes, sir.

Q. All right. What happened next?

A. I forgot, first we put the pin curls up.

Q. Who did that? A. Mrs. Briss.

Q. All right.

A. And then we opened the bottle.

Q. All right.

A. Then she took cotton and saturated all the pin curls on the head with this pin curl solution.

Q. Mrs. Briss did that?

A. Yes, sir. [83]

Q. How long did you leave that on?

A. We left that on ten minutes.

Q. Is that according to the directions?

A. It is.

(Testimony of Mrs. John W. Nihill.)

Q. What did you do next?

A. While we were waiting for the ten minutes to pass, we mixed the neutralizer.

Q. How did you mix that?

A. You take this powder and mix it with one quart of water.

Q. What did you mix that in?

A. A quart jar.

Q. Which you already testified you made available there? A. Yes.

Q. Was that during this ten minutes now, that the first half of the lotion is on?

A. Yes.

Q. All right. What did you do next?

A. Then when the ten minutes were up we took a clean dish and poured the other half of the solution in the dish and saturated all the curls again with the pin curl solution.

Q. Was that according to the directions?

A. Yes, sir.

Q. And how long did you leave that—— [84]

Mr. Packard: If the Court please, that is a conclusion——

The Court: I think so. Objection sustained. The jury will disregard the last question and answer.

Q. (Mr. Lanier, resuming): All right, your Honor. You poured out the remaining half of the pin curl lotion into a dish and then you took the cotton and re-dobbed the remaining half of that, is that correct? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Mr. Packard: I object. The question is leading and suggesting——

Mr. Lanier: Well, I am only repeating, your Honor.

Mr. Packard: You don't have to repeat, the evidence will stand in the record.

The Court: I think that's true, Mr. Lanier.

Mr. Lanier: All right.

The Court: May I ask the witness, you testified something about the use of the neutralizer. Did you mix that with the lotion or how was that used? [85]

The Witness: You mix that with water in the quart jar.

The Court: All right. Then what did you do?

The Witness: Set it to one side.

The Court: All right.

Q. (Mr. Lanier, resuming): Just so we have the record straight on this, Mrs. Nihill, will you tell me now what you did with the second half of the pin curl lotion?

A. Well we took it and saturated the hair, all the curls again.

Q. With what?

A. With this pin curl solution.

Q. And how did you saturate it, what did you use? A. A piece of cotton.

Q. All right. Now how long did you leave that?

A. Ten minutes.

Q. What did you do then?

A. Then you make your test curl.

Q. What did you do, what was done?

(Testimony of Mrs. John W. Nihill.)

A. Mrs. Briss made the test curl. She unrolled one at the back of the neck, one that had been put up on the plastic curlers because they say that is the hardest part of the hair to curl. [86]

Q. Did she make that test curl?

A. Yes, she did.

Q. Did you see her do it? A. Yes, sir.

Q. Was it apparently satisfactory?

A. It was.

Q. What did you do next?

A. Then she, oh I had—oh, then she put a net on the hair and rinsed it with water.

Q. Rinsed it with water? A. Yes.

Q. What did she do next?

A. Then she took and saturated each one of the —first, she poured half of the neutralizer in a bowl, then she took this cotton and saturated each of the pin curls again.

Q. Now, she took the neutralizer solution then and saturated it with cotton with each curl? Is that correct? A. Yes.

Q. That was one-half of it?

A. That was one-half.

Q. All right, when she had that all saturated with one-half of the solution, what did she do?

A. She waited, let's see, I think it was five minutes.

Q. What did she do then?

A. Then she took the other half of the solution and put it in another dish and repeated the same thing. [87]

(Testimony of Mrs. John W. Nihill.)

Q. And then what did she do?

A. Well then she——

Q. In the meantime when this solution was going on her hair, Mrs. Nihill, was it being caught in anything or not?

A. Yes, Sandra had her head down and she was dobbing it like this (witness demonstrates) over the sink, and she had a towel protecting her eyes.

Q. Did she have a bowl or anything in the sink catching it? A. Yes, she did.

The Court: By the solution you mean what?

The Witness: The neutralizer. Maybe I should say neutralizer.

The Court: Specify what solution you are talking about so we will know.

The Witness: Well they said solution in that so many times.

The Court: Yes. Proceed.

Q. (Mr. Lanier, resuming): This is the neutralizer now. And then when you did that the second time and caught it in the bowl, what did you do then?

A. Then she poured the rest of the neutralizer over the head and then she dobbed it and left it to dry dry. [88]

Q. All right. Then what did she do?

A. Then when it was dry why she took out the bobby pins, or first she washed—let's see, yes after the neutralizer she washed it and then she took out the bobby pins, after it was dry, and then she washed it, oh, I'm getting all mixed up.